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In The

Supreme Court of the United States

October Term, 1994

ARMANDO DAMIAN, M.D. AND
DAMIAN CLINIC, INC.,

Petitioners,

v.

CHARLES GALAYDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio scheme for awarding prejudgment interest violates the Due Process Clause of the Fourteenth Amendment when it permits an award of prejudgment interest in a manner that (a) punishes a defendant's exercise of his constitutional right of access to the judicial process and (b) does not apply equally to plaintiffs and defendants.

RULE 29.1 STATEMENT

Petitioner Damian Clinic, Inc. states that it has no parent company and that it has no subsidiary.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Armando Damian, M.D., and Damian Clinic, Inc., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Appendix, *infra*, App. 1) is reported at 71 Ohio St. 3d 421, 644 N.E.2d 298. The opinion of the Cuyahoga County Court of Appeals (App. 28) is unreported. The judgment entry

of the Cuyahoga County Court of Common Pleas, granting plaintiff's motion for prejudgment interest (App. 89) is unreported.

JURISDICTION

The Ohio Supreme Court issued an opinion in this case on December 30, 1994. A timely motion for reconsideration was denied on February 15, 1995. 71 Ohio St. 3d 1467, 644 N.E.2d 1389. (*See* App. 106.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT

Petitioners, a physician and his medical clinic, come before this Court bearing the severe burden of an award of prejudgment interest of nearly $2,000,000, an amount that is more than two-thirds of the underlying judgment against them. That burden was imposed by the trial court as a punishment for petitioners' having exercised their constitutional right of access to a judicial determination of the claims against them, rather than settling the claims

out of court. This imposition of punishment for the exercise of constitutional rights violates the most basic principles of the Due Process Clause.

As is true in an overwhelming majority of the States, Ohio law provides for an award of prejudgment interest in certain civil actions. Ohio Rev. Code § 1343.03(C). The Ohio scheme for these awards is intended to encourage settlement by permitting an award of prejudgment interest against defendants who lose at trial and who thereafter are found not to have acted in good faith with respect to possible pretrial settlement.

Such an incentive is on its face unobjectionable. And, until the opinion of the Supreme Court of Ohio in this case, the application of the statute had been guided by constitutionally compelled doctrines announced by that court. These doctrines ensured that awards of prejudgment interest did not penalize or infringe on a defendant's constitutional right to try, rather than settle, disputed claims within the judicial process prescribed by the Ohio Constitution. *See* Ohio Const., art. IV, § 1.

Of critical importance to preserving the constitutionality of Ohio's system was a proviso expressly articulated by the Supreme Court of Ohio in the controlling case on the issue: "If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Kalain v. Smith*, 25 Ohio St. 3d 157, 495 N.E. 2d 572, syllabus (1986).[1] This

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[1] In Ohio, the syllabus has the force of law and expresses the holding of the Court. Ohio R. Rep. Op. (1)(B).

critical proviso allowed Ohio's system for awarding prejudgment interest to encourage settlement without infringing on constitutional rights. Ohio law under *Kalain* required good faith efforts at settlement, a laudable objective, and permitted the imposition of prejudgment interest when a party failed to fulfill its obligations in that regard. Such a failure might include the use of dilatory techniques to postpone settlement or trial, the subversion of litigation through misconduct in pretrial discovery, or even the failure to make a monetary settlement offer when liability was clear. *See, e.g., Kalain, supra; Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657, 590 N.E.2d 737 (1992).

The holding in *Kalain* made clear, however, that an award of prejudgment interest could not be predicated on the failure to make a settlement offer if the defendant was acting in good faith and seeking only to exercise the constitutional right of access to a judicial determination of disputed claims, the means afforded by the State of Ohio for the resolution of disputes over liability for tort injuries.

In the present case, however, this coherent and constitutionally permissible scheme was rejected; in its place the Supreme Court of Ohio has erected a raw, vindictive, and one-sided scheme that permits the punishment of defendants such as petitioners, who choose reasonably and in good faith to submit the issue of their liability to the State-prescribed method of adjudication. Under the rule announced by the Supreme Court of Ohio in its opinion in this case, prejudgment interest can be awarded against a defendant solely because he failed to make a settlement offer. Such an award is punitive because it

exacts from the defendant a monetary penalty unrelated to compensation of the plaintiff; and the punishment is unconstitutional because it is directed, not at unlawful or socially abhorrent behavior, but at the exercise of a constitutionally-protected right: the right of access to judicial process.

The Ohio scheme offends the Due Process Clause further because it is one-sided: it does not treat plaintiffs and defendants equally. A plaintiff who makes no settlement demand, and who thereafter loses at trial, is not subject to sanction for having proceeded; and the defendant who incurs all of the costs of litigation as a result of the plaintiff's failure faces no prospect of receiving compensation for those costs.

The right of access to judicial process is an elemental strand of the Due Process Clause. Far from limiting that right, the constitutional system in Ohio enshrines it: the State's Constitution itself proclaims that the right to trial by jury shall be "inviolate", Ohio Const., art. I, § 5, and a separate provision of the Constitution ensures that courts shall remain open. Ohio Const., art. I, § 16. Alas, Ohio's system for the imposition of prejudgment interest breaks these promises. The resulting system interferes not only with the state constitutional rights, but with the federal right of access secured by the Due Process Clause.

1. The respondent's claim against petitioners.

Respondent filed this action against several physicians and medical service providers, alleging that they had rendered negligent medical care to him following his

involvement in a near-fatal automobile accident. In particular, respondent claimed that petitioner did not act within acceptable standards of care in several respects, including the alleged failure to perform certain diagnostic procedures during surgery.

Petitioners resisted the liability claims on the ground that their conduct conformed to accepted medical standards. Specifically, they contended that the procedures in question were not required for any diagnostic purpose; and, further, they contended that the decision to forgo the procedure in question was medically appropriate in light of the severity of respondent's injuries and the urgent need for surgical repair. These contentions were supported by competent expert testimony and other proofs that were sufficient to require submission of the case to the jury because reasonable minds could differ on the question of liability.

2. The trial court's award of prejudgment interest.

The jury returned a verdict finding petitioners liable on plaintiff's claims of medical negligence. The trial court then added to the verdict an award of prejudgment interest, which was to accrue pursuant to the statute at the judgment rate from the date of the plaintiff's injury. In determining to make the award of interest, the trial court rested entirely on its view that the existence of a genuine question about liability, rather than shielding defendants from penalty, was itself a reason for imposing the penalty. (App. 89.)

In particular, according to the trial court, a failure to make any settlement offer would be permissible only "where a reasonably prudent trial lawyer would consider the probability of plaintiff's success to be nonexistent, or barely marginal at best." (App. 100.) Thus, whether or not a defendant believed in good faith that it was liable, it was nonetheless required to make an offer of settlement if there was some appreciable risk that a jury would find liability: "It is not prudent, however, to ignore the obvious and apparent adverse consequences of all the evidence and fail to rationally assess risks which are reasonably apparent." (App. 100-01.)

3. The Ohio Supreme Court's affirmance of the award.

On appeal, the Ohio Supreme Court affirmed the trial court's award of prejudgment interest, rejecting petitioners, statutory and constitutional challenges to the award. App. 9-13.[2] The Ohio court rejected petitioners' contention that prejudgment interest under the Ohio statute was punitive, declaring it to be "wholly compensatory" in that it afforded compensation for the loss of use of funds occasioned by the defendants' " 'failure . . . to negotiate in good faith.' " App. 10, *quoting Digital & Analog Design Corp., supra*, 63 Ohio St. 3d at 660-661, 590

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[2] While the Ohio court's opinion upheld the award as consistent with the due process and jury trial guarantees of the Ohio Constitution, petitioner's challenge had expressly rested on both the Ohio and the federal Constitutions.

N.E.2d at 746. In view of its asserted compensatory purpose, the court said, the statutory scheme did not unconstitutionally penalize or burden the defendants' right to a judicial determination of the claims against them.

Moreover, the Ohio court held that the trial court's definition of the standard for prejudgment interest liability was correct, notwithstanding the rule adopted in *Kalain* that a defendant's failure to offer settlement could not be sanctioned if the defendant held a good faith and reasonable belief that he was not liable. Thus, the court said, a defendant who failed to offer settlement could be held liable for prejudgment interest whenever there was "credible" evidence of negligence and the plaintiff's injuries were "arguably" attributable to the defendant's conduct. App. 14.

REASONS FOR GRANTING THE PETITION

The right of access to courts for the resolution of disputes is both fundamental and constitutional. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964). Among the core reasons for the very existence of civil society is the provision of a means for the peaceful decision of conflicting claims of right. State rules of law that prevent or impair access to the state's monopoly on dispute resolution deny due process of law to plaintiffs when they pose unreasonable barriers to the making or

proof of a claim. And they deny due process to defendants when they penalize the pursuit of a judicial determination of disputed claims of liability. "Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend.' " *Boddie*, 401 U.S. at 377, *quoting Windsor v. McVeigh*, 93 U.S. 274, 277 (1876).

As construed and applied by the Ohio Supreme Court in this case, Ohio's prejudgment interest scheme imposes a penalty, in an amount unrelated to compensation, on a losing defendant who in good faith insists on exercising the constitutional right to a judicial determination of liability. The Ohio scheme, moreover, imposes that penalty in a wholly one-sided fashion, without any corresponding sanction for the plaintiff who fails to engage in settlement.

I. THE RULE ANNOUNCED IN THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE BY UNILATERALLY PENALIZING DEFENDANTS FOR THE EXERCISE OF THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS.

The question presented to this Court is whether this punitive and one-sided system is consistent with the Due Process Clause of the United States Constitution. It is not.

When a claim is made against a defendant, there may be much to be gained from settlement, from working out a mutually satisfactory resolution of the dispute. The public values of private ordering undoubtedly permit the states to create incentives for settlement, and they likewise permit at least some imposition of the costs of

litigation on those who resort to it. Moreover, it is certainly within the power of the states to punish those who misuse or abuse the apparatus of state-sponsored dispute resolution, by pursuing meritless claims or defenses in bad faith, for example, or by litigating solely for purposes of harassment or delay.

All of these principles are truisms. But they neither explain nor justify Ohio's system of prejudgment interest as it has been authoritatively construed by the Ohio Supreme Court in this case.

Under the Ohio system, a losing defendant is required to pay prejudgment interest if he failed to make or respond to settlement offers. The liability is avoided only if the defendant believed that he had no liability *and* if a "reasonably prudent trial lawyer" would have regarded the possibility of an adverse verdict as "nonexistent" or "barely marginal at best." The amount of the liability for prejudgment interest is measured by the entire amount of the judgment, and it accrues from the date of injury, rather than from the date of the failure to settle.

This scheme undoubtedly burdens the right to insist on a judicial resolution of the plaintiff's claims against the defendant. Such a burden is unconstitutional. As this Court held in *Boddie*, where the judicial proceeding is "the only effective means of resolving the dispute at hand", the defendant is constitutionally entitled to access to that proceeding. *Boddie*, 401 U.S. at 377. In *Boddie*, this Court struck down a state scheme that conditioned access on the ability to pay. Ohio's scheme for prejudgment

interest likewise fails, because it punishes those who exercise that same right of access.

As with the petitioners in *Boddie*, tort defendants in Ohio are forced to settle "their claims of right and duty through the judicial process." *Id.* Yet, the defendant who declines to settle and chooses instead to exercise his right to trial does so at the substantial peril of being liable not only for the plaintiff's injuries but for an award of prejudgment interest as well. This liability cannot be avoided by a good faith and reasonable belief that there is no liability on the underlying claim. Rather, an award of interest is avoided only if the risk of losing on the underlying claim is "nonexistent" or "barely marginal."

Faced with a triable claim, then, a defendant is required to substitute actuarial analysis of the claim in place of a determination whether it is meritorious: if there is some appreciable risk of losing, the defendant must forgo judicial resolution and settle, or else pay an interest penalty for having pursued judicial resolution. Even a defendant wholly (and reasonably) convinced of the legal and factual soundness of his position cannot safely proceed to trial unless the plaintiff's claim is so weak as to be subject to dismissal or summary disposition before trial. Thus, the prejudgment interest penalty drastically constrains a decision that is protected by the Constitution.

The interest penalty is, moreover, unrelated either to the costs of litigation or to compensation of the plaintiff for the failure to settle. The Ohio system certainly does not internalize to the parties the costs of litigation, as is the case, for example, with rules imposing jury fees and

similar court costs on the losing party. An award to the plaintiff of prejudgment interest on the entirety of the verdict neither recoups the state's costs of administering justice nor is even measured by reference to those costs.

Similarly, the award does not compensate the prevailing party but is, rather, punitive in its structure. Notwithstanding the Ohio court's declaration that an award of prejudgment interest is "wholly compensatory," the amount of the award is in fact not determined by the loss accruing to the plaintiff from the failure to settle. In this respect, Ohio appears to be unique among the American jurisdictions that permit an award of prejudgment interest for a failure to settle: in each of the other jurisdictions, the amount of the award is calculated by reference to the time at which the defendant should have settled, thereby compensating the plaintiff for the loss actually caused by the failure to settle.[3]

In Ohio, by contrast, the award is calculated on the whole verdict and reaches back to the date of injury. Because it thus has no basis in the loss caused by the specific conduct deemed to be objectionable (that is, the failure to settle), the award is necessarily punitive in character.

Further, the Ohio system, whether characterized as compensatory or punitive, is wholly one-sided: only defendants bear the risk of sanction for a failure to settle. A plaintiff who makes no effort to settle, and who loses at

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[3] *See, e.g.*, Colo. Rev. St. § 13-17-202; Conn. Gen. St. Ann. § 52-192a; Fla. St. Ann. § 45.061; Idaho Code § 12-301; Minn. St. Ann. § 549.09; Mo. St. Ann. § 408-040; Nev. St. Ann. § 17.115.

trial, faces no sanction at all under the Ohio system. In contrast, a defendant who makes no effort to settle faces the palpable, and often severe, sanction of an award of prejudgment interest on the entire judgment.

These characteristics of the Ohio system – its punitive quality, and its one-sidedness – are the source of its constitutional infirmity. Ohio undoubtedly could establish, consistently with the Constitution, a system of prejudgment interest that compensated parties for the losses occasioned by the delays inherent in judicial dispute resolution, or one that punished abuses of the litigation system.

There could be no serious objection, for example, to a regime that provided for prejudgment interest on all judgments, or on all judgments involving particular kinds of claims. Similarly unobjectionable would be a rule that imposed liability for prejudgment interest for a failure to settle, with the amount of the interest calculated from the date of the failure. Likewise permissible would be a system that imposed liability for prejudgment interest, even from the date of the injury, if the defendant proceeded to trial in bad faith or without any triable defense to the plaintiff's claim.

The first two of these schemes would be compensatory, and the third, though punitive, would punish abuse of the litigation system, rather than its legitimate use. The flaw in the Ohio system is that it applies a punitive sanction to conduct that cannot constitutionally be punished.

The system provides for interest from the date of injury, but it does so only as to some defendants, and the

sole criterion for selecting between those who are and are not liable is whether the defendant has exercised his constitutional right to a judicial resolution of the claim against him. The system thus neither compensates for the delays caused by non-settlement nor compensates non-discriminatorily for the loss of use of funds from the date of injury. Instead, the system affords the latter "compensation" only against defendants who have chosen to exercise a fundamental constitutional right.

However broad a state's powers may be in constructing incentives to settlement, those powers may not be exercised to punish the exercise of constitutional rights. *See, e.g., Shapiro v. Thompson* (1969), 394 U.S. 618, 631 *quoting United States v. Jackson* (1968), 390 U.S. 570, 581 ("If a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' ").

The Ohio prejudgment interest scheme at issue in this case imposes a one-sided penalty on a defendant's good faith exercise of the fundamental right to resort to the courts for dispute resolution. It forces a defendant to give up meritorious defenses, to forgo a neutral adjudication, and to compromise the underlying rights themselves, in any case in which as a matter of probabilities there is a greater than "marginal" chance that the plaintiff will prevail. At the same time, it imposes no similar burdens or risks on recalcitrant plaintiffs.

The values of settlement are undeniable. But they are hardly absolute. *See generally* Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Galanter and Cahill, "Most Cases

Settle": Judicial Promotion and Regulation of Settlements, 46 Stanford L. Rev. 1339 (1994). The system of judicial dispute resolution exists precisely because there are situations in which the existence of a legal right is a matter of legitimate dispute. That system is constitutionally grounded, and resort to it is constitutionally protected, in order to provide a means for the protection and vindication of legal rights. Where "interests of basic importance are involved, . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 430, n. 5 (1982), *quoting Boddie*, 401 U.S. at 377.

Ohio lacks a state interest of countervailing significance sufficient to justify the infringement on this fundamental right that its prejudgment interest scheme entails. The Ohio system inverts the constitutional scheme, punishing the defendant whenever there is a genuine question for resolution and withholding punishment only when the merits of the defendant's position are so obvious that a trial is not needed to establish them. The Ohio system, as construed and applied by the Ohio Supreme Court in this case, violates the Due Process Clause of the Fourteenth Amendment. It cannot stand.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Ohio should be granted.

Respectfully submitted,

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GALAYDA, APPELLEE, *v.* LAKE HOSPITAL SYSTEMS, INC., F.K.A. LAKE COUNTY MEMORIAL HOSPITALS, INC.; DAMIAN ET AL., APPELLANTS.

[Cite as *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 421.]

Statement of the Case

1. R.C. 2323.57, which requires a trial court upon motion of a party to order that any future damages award in excess of $200,000 be paid in a series of periodic payments, is unconstitutional in that it violates the Right to Jury Trial Clause (Section 5, Article I) and the Due Process Clause (Section 16, Article I) of the Ohio Constitution.

2. R.C. 1343.03(C), which authorizes an award of pre-judgment interest in a tort action against a defendant who failed to act in good faith to settle, does not violate either the Due Process Clause (Section 16, Article I) or the Right to Jury Trial Clause (Section 5, Article I) of the Ohio Constitution by imposing a penalty for exercise of that right.

(No. 93-2276 – Submitted September 21, 1994 – Decided December 30, 1994.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 63151.

On the morning of June 18, 1988, plaintiff-appellee Charles Galayda ("plaintiff") lost control of his minivan and hit a tree. He was transported to Lake County Hospital East by ambulance at 3:30 a.m.

While at Lake County Hospital, plaintiff underwent three operations which were performed by appellant, Dr.

Armando B. Damian. During each of these procedures, Dr. Damian observed bile staining within the abdominal cavity. On each of these occasions, Dr. Damian visually examined the common bile duct by performing a Kocher maneuver. However, at no time did Dr. Damian order a cholangiogram, in which dye is injected into the bile duct system, which is then X-rayed to find leaks or injuries.

After the third surgery on July 6, 1988, plaintiff developed a high fever, gastrointestinal bleeding and adult respiratory syndrome. On July 12, 1988, Dr. Damian transferred plaintiff to Cleveland Metropolitan General Hospital, n.k.a. Metro Health Medical Center, by Life-flight helicopter. Plaintiff was treated by Dr. Marc Eckhauser and Dr. Allen Cohen, who found a large volume of blood in his stomach. On July 13 and 14, 1988, Dr. Eckhauser performed two surgeries, removing part of plaintiff's stomach and a substantial amount of dead intestine. During the first of these operations, Dr. Eckhauser observed bile staining in the area of the pancreas, beneath the liver and around the bowel.

On July 20, 1988, Dr. Cohen performed a cholangiogram and discovered a leak in the common bile duct. Dr. Cohen bypassed the leak in order to give the common bile duct time to heal itself. Plaintiff was discharged from Cleveland Metro on November 10, 1988, but without the use of his left eye. He was rendered sightless in that eye as the result of infection which originated in the area of his abdominal surgeries. In addition, his surgeon, Dr. Eckhauser, described plaintiff as being a potential "gastrointestinal cripple" as a result of the removal of sections of his intestine and stomach.

Plaintiff commenced an action for medical malpractice in the Court of Common Pleas of Cuyahoga County on April 26, 1989 against Dr. Damian, Damian Clinic, Inc. ("defendants") and several other medical care providers who are not parties to this appeal. Following a trial in July 1991, the jury rendered a unanimous verdict in favor of plaintiff in the total amount of $2,781,710. In answering interrogatories submitted to it, the jury specifically found that the defendants, Dr. Damian and Damian Clinic, Inc., failed to meet the standards of care required of them by failing to order a cholangiogram in any of plaintiff's operations and by failing to transfer him to a hospital capable of treating his injuries. The jury awarded plaintiff $800,000 as past damages and $1,981,710 in future damages, of which $1,396,125 was designated as compensation for pain and suffering and $585,585 represented lost wages.[1]

Defendants timely filed a joint motion for periodic payments of future damages pursuant to R.C. 2323.57(C). Contemporaneously, plaintiff filed a motion for prejudgment interest pursuant to R.C. 1343.03(C). The trial court granted plaintiff's motion for prejudgment interest. However, the trial court found R.C. 2323.57, which provides for the periodic payment of future damages, to be unconstitutional, and therefore denied the defendants' motion.

The Eighth District Court of Appeals, in a unanimous opinion, affirmed the judgment of the trial court.

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[1] Plaintiff sought no compensation for future medical expenses.

This cause is now before this court pursuant to the allowance of a motion to certify the record.

A. WILLIAM SWEENEY, J. R.C. 2323.57[2] mandates that, upon timely motion of a party, awards of future damages in excess of $200,000 be paid periodically rather than in a lump sum in medical malpractice claims. R.C.

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[2] R.C. 2323.57 provides, in part:

"(C) [I]f the total of the future damages described in division (B)(1)(b) of this section exceeds two hundred thousand dollars, then, at any time after the verdict or determination in favor of the plaintiff in question is rendered by the trier of fact but prior to the entry of judgment in accordance with Civil Rule 58, the plaintiff or the defendant in question may file a motion with the court that requests the court to include an order in the journal entry that the future damages in excess of two hundred thousand dollars shall be paid in periodic payments rather than in a lump sum. *If such a motion is timely filed, the court shall include* in the journal entry *an order that* includes all of the following:

"(1) A requirement that the first two hundred thousand dollars in future damages be paid in a lump sum * * *;

" * * *

"(2) A requirement that the *future damages in excess of the two hundred thousand dollars paid in a lump sum * * * be used to fund a series of periodic payments over a period of time* in accordance with divisions (D), (E), and (F) of this section." (Emphasis added.)

The full text of R.C. 2323.57 is reproduced as an appendix to this opinion.

1343.03(C),[3] Ohio's prejudgment interest statute, provides for an award of interest to be granted in favor of successful tort plaintiffs, when the trial court finds that the defendant failed to act in good faith to achieve pretrial settlement of the dispute. We are called upon in this case to determine the constitutionality of each of these statutes. We affirm the findings of the lower courts that R.C. 1343.03(C) survives a constitutional challenge, while R.C. 2323.57 does not.

I

Constitutionality of Ohio's Periodic Payment of Future Damages Statute

Both lower courts found that R.C. 2323.57 violates the Right to Jury Trial Clause of Section 5, Article I and the Due Process Clause of Section 16, Article I of the Ohio Constitution. For the reasons which follow, we affirm.

Section 5, Article I of the Ohio Constitution provides that:

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[3] R.C. 1343.03(C) provides as follows:

"Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to when the money is to be paid did not fail to make a good faith effort to settle the case."

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

It is well established that the right of trial by jury in this state is a fundamental and substantial right guaranteed by the Ohio Constitution. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, 633 N.E.2d 504, 510; *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743, 746; and *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3. This court has held there is a fundamental constitutional right to a trial by jury in negligence actions. *Sorrell, supra,* 69 Ohio St.3d at 422, 633 N.E.2d at 510; *Kneisley, supra,* 40 Ohio St.3d at 357, 533 N.E.2d at 746. Included in that right is the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled. *Sorrell, supra,* 69 Ohio St.3d at 422, 633 N.E.2d at 510.

R.C. 2323.57(C) requires a trial judge, upon timely motion of any party, to order that any future damages award which exceeds $200,000 be paid in periodic installments rather than in a lump sum upon entry of judgment. Moreover, R.C. 2323.57(E)(2) provides, in pertinent part, that "[t]he total amount paid under this division and the periodic payments plan shall not exceed the amount of the judgment." R.C. 2323.57(F)(1) further mandates that, if a plaintiff dies prior to the receipt of all of the periodic payments, all payments for future medical expenses and for noneconomic loss, such as pain and suffering, loss of consortium, disfigurement, mental anguish and any other intangible loss, shall cease.

In Ohio, a plaintiff is entitled to an award of damages to compensate him for losses which he is reasonably certain to incur in the future. *Pennsylvania Co. v. Files* (1901), 65 Ohio St. 403, 407, 62 N.E. 1047, 1047; *Roberts v. Mut. Mfg. & Supply Co.* (1984), 16 Ohio App.3d 324, 16 OBR 355, 475 N.E.2d 797. Under the common law of Ohio, future damages must be rendered to present value, and a defendant is entitled to a jury instruction to that effect. *Maus v. New York, Chicago & St. Louis RR. Co.* (1956), 165 Ohio St. 281, 59 O.O. 366, 135 N.E.2d 253, paragraph one of the syllabus. Thus in Ohio, a jury is to return a verdict not in an amount reflecting the actual damages it deems to be reasonably certain to occur in the future, but rather in a reduced amount representing the present value of those actual damages.

It is evident that application of R.C. 2323.57 to a jury verdict does not merely mandate the *manner* in which a judgment shall be paid; rather, it requires the trial court to further reduce the jury's award of damages already once reduced to present value. Application of the statute quite simply results in a successful plaintiff's receiving less than the jury awarded, and deprives the most severely injured victims of the benefits of investment.

That R.C. 2323.57 regulates more than merely the manner in which a judgment is paid and instead reduces the actual value of the verdict can be illustrated by comparing two hypothetical plaintiffs, both of whom receive future damages awards of $1,000,000. Assume the first plaintiff receives his entire judgment in a lump sum, but determines to use the proceeds to purchase an annuity. Assume the second plaintiff is subjected to application of R.C. 2323.57. Obviously the stream of income produced

by investment in an annuity by the first plaintiff of the entire $1,000,000 will exceed the payout generated in the second case, where the entirety of the judgment (except the first $200,000) will be received in the future with no regard for the effect of inflation and no interest or other investment appreciation. This is assured by application of R.C. 2323.57(E)(2), which specifically provides that "[t]he total [lump sum] amount paid under this division and the periodic payments plan shall not exceed the amount of the judgment." It is readily apparent that R.C. 2323.57 effectively reduces a jury's award without the consent of the plaintiff.[4]

For the foregoing reason, we find that R.C. 2323.57(C) invades the jury's province to determine damages, and that the statute violates a plaintiff's right to trial by jury as guaranteed by Section 5, Article I of the Ohio Constitution.

Nor is R.C. 2323.57 consistent with the Due Process Clause of the Ohio Constitution. Section 16, Article I of the Ohio Constitution guarantees that every person who suffers a legally compensable injury "shall have remedy by due course of law." This provision is the equivalent of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544, 21 O.O. 422, 424, 38 N.E.2d 70, 72.

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[4] Legislatively imposed remittiturs may well violate the doctrine of separation of powers. See *Murphy v. Edmonds* (Md.1992), 325 Md. 342, 380, 601 A.2d 102, 120 (Chasanow, J., dissenting), citing *Sofie v. Fibreboard Corp.* (1989), 112 Wash.2d 636, 652-654, 771 P.2d 711, 720-721.

The trial court found R.C. 2323.57 to be "unreasonable, arbitrary, and [to have] no reasonable relationship to any good which may have been perceived by the Legislature to benefit the public health and welfare." The court of appeals concurred that R.C. 2323.35 is unconstitutional based upon due process grounds. We agree with the lower courts that R.C. 2323.57 violates the Due Process Clause of the Ohio Constitution for the reasons set forth in *Sorrell, supra.* There is insufficient evidence of a relationship between tort reform legislation and the availability or affordability of medical malpractice insurance. *Id.*, 69 Ohio St.3d at 423, 633 N.E.2d at 511.

Therefore, we hold that R.C. 2323.57, which requires a trial court upon motion of a party to order that any future damages award in excess of $200,000 be paid in a series of periodic payments, is unconstitutional in that it violates the Right to Jury Trial Clause (Section 5, Article I) and the Due Process Clause of Ohio Constitution (Section 16, Article I).

II

Constitutionality of Ohio's Prejudgment Interest Statute (R.C. 1343.03)

This court recently analyzed Ohio's prejudgment interest statute at length in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331, but we were not in that case called upon to consider the constitutionality of R.C. 1343.03. The defendants herein make essentially the same argument we rejected in *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 160, 25 OBR 201, 203, 495 N.E.2d 572, 574, *i.e.*, that imposing a "good faith effort to

settle" requirement forces a defendant to forgo the right of having a jury determine the existence of his liability in tort.

We reaffirm our holding in *Kalain* that "R.C. 1343.03(C) does not infringe upon a party's right to a jury trial." *Id.* at 160, 25 OBR at 203, 495 N.E.2d at 574. It is true that a defendant who chooses to try a case before a jury rather than settle it risks the possibility that he may ultimately be found liable for a larger total judgment if prejudgment interest is awarded. However, the potential application of R.C. 1343.03 in no way precludes a defendant from insisting on exercising his right to trial by jury nor does it "create a financial barrier that prevents a * * * party from taking his case to a jury." *Kuenzer v. Teamsters Union Local 507* (1981), 66 Ohio St.2d 201, 203, 20 O.O.3d 205, 207, 420 N.E.2d 1009, 1011, fn. 6. The defendant's right of access to a jury for determination of factual issues remains unimpaired.

We similarly reject defendants' contention that R.C. 1343.03 imposes a penalty upon defendants for having exercised their right to a jury where prejudgment interest is awarded against them. In *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737, we found such an award to be compensatory in nature rather than punitive. Writing for the majority, Justice Wright noted that the "prejudgment interest statute is designed to compensate the aggrieved party for the delay encountered by the failure of the tortfeasor to negotiate in good faith," and "ensures that just compensation to the tort victim is not eroded by the dilatory tactics of the tortfeasor. * * * " *Id.* at 660-661, 590 N.E.2d at 746. In such a case, the defendant "allow[s] the interest monies on the

[defendant's monetary reserves] to accumulate to the benefit of the party required to pay and to the detriment of the party to whom the money is to be paid." *Dailey v. Nationwide Demolition Derby, Inc.* (1984), 18 Ohio App.3d 39, 41, 18 OBR 108, 110, 480 N.E.2d 110, 112. Where a defendant benefits monetarily as a result of failing to negotiate possible settlement in good faith, R.C. 1343.03 does not constitute a penalty, but, to the contrary, is wholly compensatory, and indeed equitable, in nature.

Similarly, it is the jury's function to determine the amount of damages suffered by a plaintiff. Since determining the amount of prejudgment interest awards is entirely separate and distinct from determining the amount of damages suffered by the plaintiff, and does not involve questions of fact, R.C. 1343.03 does not violate the fundamental constitutional right to trial by jury.

Defendant's contention that R.C. 1343.03 violates the Due Process Clause of the Ohio Constitution is unfounded. Prejudgment interest statutes have consistently been found to be constitutional by courts both in Ohio and elsewhere. See, *e.g., Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App.3d 222, 14 OBR 250, 470 N.E.2d 941; *Mills v. Dayton* (1985), 21 Ohio App.3d 208, 21 OBR 222, 486 N.E.2d 1209; *Edgerson v. Cleveland Elec. Illum. Co.* (1985), 28 Ohio App.3d 24, 28 OBR 34, 501 N.E.2d 1211. See, generally, Annotation, Validity and Construction of State Statute or Rule Allowing or Changing Rate of Prejudgment Interest in Tort Actions (1985), 40 A.L.R.4th 147. While this is not dispositive of our inquiry, we do agree with the overwhelming weight of authority that prejudgment interest statutes are rationally related to the legitimate goals of encouraging prompt resolution of disputes,

and ensuring prompt payment of compensation to parties injured by tortious conduct.

For the foregoing reasons, we hold that R.C. 1343.03(C), which authorizes an award of prejudgment interest in a tort action against a defendant who failed to act in good faith to settle, does not violate either the Due Process Clause (Section 16, Article I) or the Right to Jury Trial Clause (Section 5, Article I) of the Ohio Constitution by imposing a penalty for exercise of that right.

The defendants further contend that the trial court improperly applied the standards established in *Kalain* in awarding prejudgment interest to plaintiff. The defendants assert that prejudgment interest cannot be awarded if a motion for summary judgment or directed verdict could not have been appropriately granted in plaintiff's favor on the issue of liability. Defendants contend that in such circumstances reasonable minds could differ on the issue of liability, thereby necessitating the conclusion that the defendant had a good faith, objectively reasonable belief of nonliability and was thus not required to make a monetary settlement offer or counteroffer. The defendants base this argument on the last sentence of the syllabus in *Kalain*, which states: "If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Id.*, 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572.

We decline to impose summary judgment or directed verdict analytical criteria on prejudgment interest proceedings. Existence of a good faith, objectively reasonable belief of nonliability does not excuse a defendant from the remaining *Kalain* obligations to (1) fully cooperate

with discovery, (2) rationally evaluate risks and potential liability, and (3) refrain from unnecessary delaying maneuvers. *Id.*, at syllabus. Moreover, the "good faith, objectively reasonable belief" language of *Kalain*, must be "strictly construed so as to carry out the purposes of R.C. 1343.03." *Moskovitz*, 69 Ohio St.3d at 659, 635 N.E.2d at 348. The purposes of R.C. 1343.03 would not be furthered by construing the evidence most favorably to the party opposing a motion for prejudgment interest as a trial court must do when ruling on a motion for directed verdict or summary judgment, or by limiting the examination of the defendant's conduct to the time of the trial or the evidence presented at trial. A defendant may well have fallen short of the good faith requirement of R.C. 1343.03, even where a trial court would have been justified in overruling a motion for summary judgment prior to trial or a motion for directed verdict made during trial.

We have reviewed the record established in the prejudgment interest hearing held in the case at bar and find that the trial court was well within its discretion in ordering prejudgment interest pursuant to R.C. 1343.03. The trial court found that the defendants had stated a position of "no offer and no settlement in such unmistakably rigid terms" following presentation of plaintiff's initial settlement demand that plaintiff's presentation of any reduced demand would have been "a vain act" and that the defendants had thereby "effectively terminated all chance for good faith negotiation." The court concluded that the defendants had "not rationally evaluate[d] the essential risks of a plaintiff's verdict, and had failed to respond in good faith" to a good faith offer from the plaintiff. A trial

court does not abuse its discretion in awarding prejudgment interest when, as here, a defendant "just says no" despite a plaintiff's presentation of credible medical evidence that the defendant physician fell short of the standard of professional care required of him, when it is clear that the plaintiff has suffered injuries, and when the causation of those injuries is arguably attributable to the defendant's conduct. We find the trial court's determinations on this issue wholly in accord with the purposes of R.C. 1343.03 and with the standards set forth in *Kalain* and *Moskovitz, supra.*

III

Alleged Evidentiary Error

The defendants argue that a defense expert's testimony should not be deemed inadmissible merely because it is expressed in terms of possibilities. In the case at bar, the trial court sustained an objection to the testimony of defense expert Dr. Donald Fry that "there are a host of blood vessels that could be responsible" for a leak of blood into plaintiff's stomach, advising the witness that "possibilities are not admissible." The defendants further argue that the trial court improperly precluded Dr. Fry from testifying that the plaintiff's bile duct injury was more likely to occur during gastrectomy surgery. Defendants suggest that this evidence tended to prove that plaintiff's bile duct leak may have been a result of surgery performed by Dr. Eckhauser after plaintiff was transferred to Cleveland Metro, and not as a result of the actions of defendants or of the automobile accident.

The primary rule governing admissibility of expert testimony provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Evid.R. 702. An analysis of an expert's testimony in terms of whether it expresses a degree of certainty in excess of fifty percent may not in every case be conclusive of the admissibility of the expert's opinion. Accord *Stinson v. England* (1994), 69 Ohio St.3d 451, 633 N.E.2d 532 (no error in allowing defense expert to testify, in effect, that the event she believed had caused plaintiff's injuries was more likely than the cause propounded by plaintiff). Similarly, the Rules of Evidence authorize exclusion of evidence, including expert testimony, when the court finds in a sound exercise of discretion that the probative value of the opinion is outweighed by the danger of undue prejudice or confusion of the issues (Evid.R. 403) or that the opinion is inadmissible pursuant to some other Rule of Evidence. The question whether any particular expert's testimony, standing alone, would satisfy the burden of proof required of a party is a separate and distinct issue which is decided according to criteria different from those used to determine admissibility.

Turning to the case at bar, we find that in answering the interrogatories propounded to it, this jury found that defendants failed to meet accepted standards of care based on defendant Damian's failure to timely order a cholangiogram and to transfer plaintiff to a hospital more capable of handling his injuries. The jury did not find

professional negligence on the part of Dr. Damian in causing the bile duct leak. The court's refusal[5] to allow Dr. Fry to testify more extensively concerning other possible causes of that leak would not have affected the jury's ultimate findings of negligence. We find on this record that error in limiting Dr. Fry's expert testimony, if any, can only be considered harmless.

Based on all of the foregoing, the judgment of the court of appeals is hereby affirmed.

Judgment affirmed.

DOUGLAS, RESNICK, F.E. SWEENEY and PFEIFER, J.J., concur.

MOYER, C.J., and WRIGHT, J., dissent.

APPENDIX

R.C. 2323.57 provides as follows:

"(A) As used in this section:

"(1) 'Economic loss' means any of the following types of pecuniary harm:

"(a) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim;

"(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services,

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[5] In fact, the record shows that a great deal of "other cause" testimony by Dr. Fry was eventually allowed by the trial court.

products, or accommodations as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim;

"(c) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim, other than attorney's fees incurred in connection with that action.

"(2) 'Future damages' means damages that result from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim and that will accrue after the verdict or determination of liability by the trier of fact is rendered in that action.

"(3) 'Medical claim,' 'dental claim,' 'optometric claim,' and 'chiropractic claim' have the same meanings as in division (D) of section 2305.11 of the Revised Code.

"(4) 'Noneconomic loss' means nonpecuniary harm that results from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

"(5) 'Past damages' means damages that result from an injury, death, or loss to person or property that is a

subject of a civil action upon a medical, dental, optometric, or chiropractic claim and that have accrued by the time that the verdict or determination of liability by the trier of fact is rendered in that action.

"(6) 'Trier of fact' means the jury or, in a nonjury action, the court.

"(B)(1) In any civil action upon a medical, dental, optometric, or chiropractic claim that is tried to a jury and in which a plaintiff makes a good faith claim against the defendant in question for future damages that exceed two hundred thousand dollars, upon motion of that plaintiff or the defendant in question, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to interrogatories that shall specify all of the following:

"(a) The past damages recoverable by that plaintiff;

"(b) The future damages recoverable by that plaintiff, and the portions of those future damages that represent each of the following:

"(i) Noneconomic loss;

"(ii) Economic loss;

"(iii) Economic loss as described in division (A)(1)(a) of this section;

"(iv) Economic loss as described in division (A)(1)(b) of this section;

"(v) Economic loss as described in division (A)(1)(c) of this section.

"(2) In any civil action upon a medical, dental, optometric, or chiropractic claim that is tried to a court and in which a plaintiff makes a good faith claim against the defendant in question for future damages that exceed two hundred thousand dollars, upon motion of that plaintiff or the defendant in question, the court shall make its determination in the action and, if that determination is in favor of that plaintiff, make findings of fact that shall specify damages as provided in division (B)(1) of this section.

"(C) If answers to interrogatories are returned or findings of fact are made pursuant to division (B) of this section and if the total of the future damages described in division (b)(1)(b) of this section exceeds two hundred thousand dollars, then, at any time after the verdict or determination in favor of the plaintiff in question is rendered by the trier of fact but prior to the entry of judgment in accordance with Civil Rule 58, the plaintiff or the defendant in question may file a motion with the court that requests the court to include an order in the journal entry that the future damages in excess of two hundred thousand dollars shall be paid in periodic payments rather than in a lump sum. If such a motion is timely filed, the court shall include in the journal entry an order that includes all of the following:

"(1) A requirement that the first two hundred thousand dollars in future damages be paid in a lump sum on a pro rata basis from among the amounts of damages awarded that represent the following four types of loss:

"(a) Noneconomic loss as specified pursuant to division (B)(1)(b)(i) of this section;

"(b) Economic loss as specified pursuant to division (B)(1)(b)(iii) of this section;

"(c) Economic loss as specified pursuant to division (B)(1)(b)(iv) of this section;

"(d) Economic loss as specified pursuant to division (B)(1)(b)(v) of this section.

"(2) A requirement that the future damages in excess of the two hundred thousand dollars paid in a lump sum pursuant to division (C)(1) of this section be used to fund a series of periodic payments over a period of time in accordance with divisions (D), (E), and (F) of this section.

"(D)(1)(a) If any party to a civil action upon a medical, dental, optometric, or chiropractic claim files a motion pursuant to division (C) of this section requesting that the future damages in excess of two hundred thousand dollars to be received by a plaintiff in the action be paid in a series of periodic payments, that plaintiff, within twenty days after the motion is filed, shall submit a periodic payments plan to the court. The plan may include, but is not limited to, a provision for a trust or an annuity, and may be proposed by that plaintiff alone or by that plaintiff and the defendant in question.

"(b) If that defendant and that plaintiff do not jointly submit a periodic payments plan, then, within twenty days after the motion requesting the payment of future damages in a series of periodic payments is filed pursuant to division (C) of this section, that defendant may submit to the court a periodic payments plan. If the

defendant does so, the plan may include, but is not limited to, a provision for a trust or an annuity.

"(c) If that defendant and that plaintiff do not jointly submit a periodic payments plan and if that defendant does not separately submit a periodic payments plan pursuant to division (D)(1)(b) of this section, then, within ten days after that plaintiff submits a periodic payments plan, that defendant may submit to the court written comments relative to the periodic payments plan of that plaintiff. If that defendant and that plaintiff do not jointly submit a periodic payments plan and if that defendant separately submits a periodic payments plan pursuant to division (D)(1)(b) of this section, then, within ten days after than defendant submits the plan, that plaintiff may submit to the court written comments relative to the period payments plan of that defendant.

"(d) The court may modify, approve, or reject any submitted periodic payments plan.

"(e) After a period payments plan is approved, the future damages that are to be received in periodic payments shall be paid in accordance with the plan, including, if applicable, payment over to a trust or annuity provided for in the plan.

"(2) If a motion requesting the payment of future damages in a series of periodic payments is not filed pursuant to division (C) of this section with respect to any plaintiff in an action upon a medical, dental, optometric, or chiropractic claim, all future damages awarded to that plaintiff shall be paid in a lump sum.

"(3) The court shall specify in the entry of judgment in the civil action the terms of any approved periodic payments plan.

"(E)(1) The court shall include in any approved periodic payments plan adequate security to insure that the plaintiff in question will receive all of the periodic payments under the approved plan. If the approved periodic payments plan includes a provision for an annuity, the defendant in question shall purchase the annuity from the following types of insurance companies:

"(a) An insurance company that the A.M. Best Company, in its most recently published rating guide of life insurance companies, has rated A or better and has rated XII or higher as to financial size or strength;

"(b)(i) An insurance company that the superintendent of insurance, under rules adopted pursuant to Chapter 119, of the Revised Code for purposes of implementing this division, determines is licensed to do business in this state and, considering the factors described in division (E)(1)(b)(ii) of this section, is a stable insurance company that issues annuities that are both safe and desirable;

"(ii) In making determinations as described in division (E)(1)(b)(i) of this section, the superintendent shall consider the financial condition, general standing, operating results, profitability, leverage, liquidity, amount and soundness of reinsurance, adequacy of reserves, and the management of an insurance company, shall consider any other relevant factors, and shall be guided by the principle that the trier of fact in a tort action should be presented only with evidence as to the cost of annuities that

are both safe and desirable for the plaintiffs in such an action who are awarded damages. In making such determinations, the superintendent also may consider ratings, grades, and classifications of any nationally recognized rating services of insurance companies.

"(2) No plaintiff who is the subject of an approved periodic payments plan shall receive a lump sum payment that is less than the plaintiff's cost of litigation, including, but not limited to, attorney's fees, plus two hundred thousand dollars. The total amount paid under this division and the periodic payments plan shall not exceed the amount of the judgment.

"(F) If a court orders a series of periodic payments of future damages in accordance with this section, the following rules shall govern those payments if the plaintiff in question dies prior to the receipt of all of them:

"(1) The liability for the portion of those payments that represents future economic loss as specified pursuant to division (B)(1)(b)(iv) of this section and future noneconomic loss of that plaintiff as specified pursuant to division (B)(1)(b)(i) of this section and that is not due at the time of his death shall cease at that time;

"(2) The liability for the portion of those payments not described in division (F)(1) of this section shall continue, but the payments shall be paid to the heirs of that plaintiff as scheduled in and otherwise in accordance with the approved periodic payments plan or, if the approved payments plan does not contain a relevant provision, as the court shall order.

"(G)(1) Nothing in this section precludes a plaintiff in question and a defendant in question from mutually agreeing to a settlement of the action.

"(2) Except as provided in division (C)(2) or (F) of this section, nothing in this section increases the time for filing any motion or notice of appeal or taking any other action relative to a civil action upon a medical, dental, optometric, or chiropractic claim, alters the amount of any verdict or determination of damages by the trier of fact in a civil action upon a medical, dental, optometric, or chiropractic claim, or alters the liability of any party to pay or satisfy any such verdict or determination.

"(H) This section does not apply to civil actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code or to civil actions against the state in the court of claims."

MOYER, C.J., dissenting. Once again, the majority has declared unconstitutional an Act of the General Assembly that is neither unconstitutional by any accepted standard of review nor bad public policy.

Consistent with my views in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 576 N.E.2d 765, and *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504 (dissenting), I would hold that the periodic payment plan for future awards provided by R.C. 2323.57 violates neither a plaintiff's right to trial by jury nor his right to due process.

In determining the constitutionality of any statute, the analysis must begin with the well-established rule that all legislative enactments enjoy a strong presumption

of constitutionality. *Sorrell, supra,* at 418-419, 633 N.E.2d at 508, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Therefore, the party challenging the statute has the burden of proving that it is unconstitutional, and if reasonable doubt exists, the doubt must be resolved in favor of the statute's validity. Moreover, it is not the function of this court to assess the wisdom or policy of a statute but, rather, to determine whether the General Assembly acted within its legislative power. *State ex rel. Bishop v. Mt. Orab Village Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 498, 40 N.Ed.2d 913, 919.

The majority misconstrues the scope of Section 5, Article I of the Ohio Constitution. I agree with the majority that the right to a trial by jury includes a determination by the jury of all questions of fact, as well as the amount of compensatory damages to which the plaintiff is entitled. Once the jury has resolved the facts and assessed the damages, however, the constitutional right is satisfied. The inviolate right to trial by jury does not mean the award of *damages* is inviolate. Surely, if the rationale used by the majority to support its judgment is extended beyond this case, judges should no longer be authorized to enter judgments notwithstanding the verdict or order remittiturs of a jury's determination of damages. While a party has a constitutional right to have a jury assess damages for injury, the party has no right to have a jury dictate the legal process by which the jury award is satisfied. It is a startling new thought that the legislative branch does not have the constitutional authority to create that legal process. It is the province of

the legislative branch to determine policy issues relating to the method by which jury awards are satisfied.

R.C. 2323.57 does nothing more than provide a remedy in the form of periodic payments of the award determined by the jury or by a court in a bench trial. R.C. 2323.57 does not infringe upon the right to a jury trial because the statute does not apply until after the jury has completed its assigned function in the judicial process. To hold otherwise runs contrary to our common law and Rules of Civil Procedure, which provide the trial court with plenary control over judgments.

The majority also finds that R.C. 2323.57 violates the due process of law provision of Section 16, Article I of the Ohio Constitution. Because no fundamental right or suspect class is involved, our standard for review of the statute should be a "rational basis" test. We have held that under this test " '[a] legislative enactment will be deemed valid on due process grounds " * * * [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." ' " (Citations omitted.) *Morris*, 61 Ohio St.3d at 688-689, 576 N.E.2d at 769. Certainly, a statute designed to respond to the growing concerns regarding the continued delivery of health care to the citizens of Ohio at affordable costs survives such minimal scrutiny. R.C. 2323.57 is simply an economic regulation and is entitled to wide judicial deference.

Because no fundamental right of the plaintiff has been violated and periodic payment of future damages provided by R.C. 2323.57 is a rational exercise of the

General Assembly's authority, I dissent from the majority's decision.

WRIGHT, J., concurs in the foregoing dissenting opinion.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 63151

CHARLES GALAYDA Plaintiff-Appellee -vs- LAKE HOSPITAL SYSTEM, INC., ET AL. [Appeal by Armando B. Damian, M.D. and Damian Clinic, Inc.] Defendants-Appellants	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION:	SEPTEMBER 30, 1993
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-168629
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	_____

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44114-1192

HARPER, J.:

Plaintiff-appellee, Charles Galayda, filed this medical malpractice action in the Court of Common Pleas of Cuyahoga County on April 27, 1989. Armando B. Damian, M.D., Damian Clinic, Inc., Lake Hospital Systems, Inc., John Paul, M.D., John Ferron, M.D., Mohammad Rezaee, M.D., Efren Glorioso, M.D., and Lake Emergency Services, Inc., were named as defendants. Mostafa Rezai, M.D., was later added as a new party defendant. Galayda alleged that negligent care rendered to him by the defendants after a motor vehicle accident proximately caused severe injuries to his person.

Dr. Ferron was voluntarily dismissed without prejudice prior to trial on April 2, 1990. This voluntary dismissal was amended to be with prejudice by a *nunc pro tunc* journal entry on June 15, 1993. The trial court granted summary judgment in favor of Dr. Rezaee on April 5, 1990. Jury trial on the malpractice action thus commenced against the remaining defendants on July 15, 1991. During trial, Galayda dismissed Dr. Paul and the trial court directed a verdict in favor of Lake Hospital Systems, Inc.

The trial which lasted for two weeks resulted in Dr. Glorioso, Lake Emergency Services, Inc. and Dr. Rezai receiving unanimous jury verdicts in their favor. An unanimous verdict was rendered against Dr. Damian and the Damian Clinic, Inc. (collectively "appellants") in the amount of $2,781,710.

The jury awarded Galayda $800,000 in present damages and $1,981,710 in future damages. The future damages consisted of $1,396,125 for pain, suffering,

disfigurement, mental anguish, humiliation, disability and/or loss pleasure of life, and $585,585 for lost wages, salaries and benefits.

Galayda thereafter filed a Motion for Prejudgment Interest. Appellants filed a Motion for Periodic Payment of Future Damages under R.C. 2323.57 and a Motion for Set-Off of Social Security and pension plan benefits. Appellants also filed a Motion for New Trial or In the Alternative, Motion for Remittitur. The trial court, on December 31, 1991, denied all of appellants' motions and granted Galayda's motion for prejudgment interest.

I.

Galayda was involved in a motor vehicle accident on June 18, 1988 when he lost control of his car and hit a tree. He was transported to Lake County Memorial Hospital, East ("Lake Hospital") in Painesville, Ohio via ambulance where he arrived at 3:30 a.m.

Dr. Glorioso, an emergency room physician at Lake Hospital, examined Galayda upon his arrival. The examination revealed that Galayda sustained a blunt traumatic injury to his chest and abdomen; exhibited low blood pressure, an erratic pulse and rapid breathing; and suffered severe chest and abdominal pain.

Dr. Glorioso telephoned Galayda's personal physician after the initial examination and was instructed to contact the surgeon who was on call at Lake Hospital. Dr. Glorioso did so by calling Dr. Damian, a board certified surgeon, after ordering blood tests and x-rays. According to Dr. Glorioso, he probably informed Dr. Damian that he

needed to come to the hospital right away because of the severity of Galayda's injuries, including possible internal bleeding. The call occurred at approximately 4:10 a.m. A second telephone call was placed to Dr. Damian when he had yet to arrive at Lake Hospital by 5:20 a.m. Throughout the nearly one and one-half hours between the first and second telephone calls, Galayda's condition did not deteriorate although his vital signs were not normal.

Dr. Damian arrived at the hospital at about 5:40 a.m. A peritoneal lavage[1] was performed on Galayda at 5:50 a.m. Since bloody fluid was withdrawn from his abdomen, Dr. Damian immediately scheduled him for exploratory surgery.

Galayda experienced a cardiopulmonary arrest just before surgery but was resuscitated. It was necessary to perform, however, an emergency tracheostomy.[2]

Surgery eventually was underway at 6:45 a.m. Dr. Damian discovered 2,000 ccs or approximately two liters of blood within the abdominal cavity. Numerous injuries to Galayda's internal organs were uncovered after the removal of the blood, including lacerations to his liver and diaphragm, contusions on the head of the pancreas, and small injuries to his small intestine and colon.

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[1] A peritoneal lavage is a needle tap of the abdomen to determine if there is any internal injury or bleeding.

[2] A tracheostomy is an insertion of a plastic tube in the windpipe to allow for the flow of oxygen.

Further, the upper part of the small intestine, the duodenum, was stained with bile.[3]

Dr. Damian repaired the diaphragm with sutures. Sutures were also used to control bleeding from the deep and multiple lacerations on the undersurface of the liver near the bile ducts. The portions of the liver rendered necrotic or dead due to lack of blood supply were then removed.

The observance of the bile staining led to the performance of a Kocher maneuver by Dr. Damian to allow for a visual inspection of the length of the common bile duct. He was searching for a leak or injury to the duct system, but suspected that bile spilling from the liver lacerations produced the bile stain. Dr. Damian reinspected the bile duct at the completion of the surgery and then placed drains in Galayda's abdomen to drain any fluids therefrom to the outside of his body.

Galayda was taken to surgery for a second time at about 2:20 p.m. The surgery was necessitated by a drop of his blood pressure along with bloody fluid draining through the drains. Dr. Damian found a tear in Galayda's spleen upon re-opening the abdomen. He, therefore, removed the spleen. The spleen was intact during the first surgery. Although bile staining remained on Galayda's duodenum, Dr. Damian found no bile leaking

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[3] The liver produces a liquid termed bile. It is a caustic substance excreted and then passed into the bowel for digestive purposes. Normally, it passes into the common bile duct from the left and right hepatic ducts of the liver. The common bile duct passes behind the upper duodenum through the head of the pancreas and empties into the duodenum.

from the common bile duct upon visual inspection. He believed the staining was the same staining observed during the first surgery even though the internal organs were washed at that time with saline solution. Drains were once again placed in Galayda's abdomen after surgery.

Bile continued to drain from the tubes. Dr. Damian noted this occurrence in his progress reports and further noted that Galayda's bilirubin level or level of bile in the bloodstream increased.

On July 6, 1988, Galayda was returned to surgery for the third time. Surgery was prompted by his increasing abdominal pain and the results of a CT scan taken on July 5, which disclosed a collection of fluid beneath the liver and bleeding from the drain. An upper gastrointestinal series further indicated that Galayda's stomach was being pushed out. Dr. Damian with Dr. Ferron assisting, uncovered what they believed to be a 7.5 to 8 cm. pancreatic pseudocyst[4] The pseudocyst was drained and then attached to the stomach wall. A collection of bile stained fluid was also found in the space below the liver.

Galayda was later life-flighted to what was then Cleveland Metropolitan General Hospital ("Metro") on July 12, 1988 when he developed an infection, a high fever, a gastrointestinal bleed and adult respiratory syndrome. Dr. Mark Eckhauser, a gastrointestinal surgeon,

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[4] A pancreatic pseudocyst is a leak of pancreatic enzyme outside of the substance of the pancreas which has a scar lining or wall around it.

and Dr. Alan Cohen, an interventional radiologist, assumed the care of Galayda at Metro.

Dr. Eckhauser performed an exploratory laparotomy on Galayda on July 13, 1988. Blood and blood clots were removed from Galayda's stomach in the amount of 5,000 ccs or 50% of the total circulating volume of blood in a normal state. Since Galayda was not in a normal state, Dr. Eckhauser explained that some of the contents removed from his stomach were present at the time he was transferred to Metro. Dr. Eckhauser testified that it appeared the blood was coming from the point where the supposed pseudocyst was sewn to the stomach wall. The bleeding was controlled with sutures and hemo-clips and a portion of the necrotic stomach was then removed. Dr. Eckhauser further noticed that Galayda's pancreas was thick and inflamed and bile staining was still present.

A second surgery was performed on Galayda at Metro on July 14, 1988. A substantial part of his right transverse colon and left colon was removed because it was necrotic with a hole in it and other parts of the colon had a poor blood supply. Galayda was nourished after the surgery with central hyperalimentation, meaning liquid nourishment was fed through tubes inserted into his chest.

Dr. Cohen subsequently performed a percutaneous (injection through the skin) cholangiogram[5] on July 20, 1988. According to Dr. Eckhauser, the test could not have

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[5] A cholangiogram is a procedure whereby dye is injected into the bile duct system to visualize through an x-ray the bile duct for leaks and injuries.

been completed during the prior surgeries at Metro because of the internal inflammation and more so because the colon condition was a more pressing problem. The test indicated a leak of bile from the common bile duct behind the duodenum and before the duct entered the pancreas.

Galayda's medical malpractice action was based *inter alia* on appellants' failure to transfer him to a level one trauma center upon his arrival at Lake Hospital and their failure to perform an intra-operative cholangiogram during his first surgery there. The procedure would have revealed the common bile duct leak. Since the procedure, however, was not performed, he suffered severe abdominal damage.

Two of Galayda's expert witnesses at trial were Marc Shapiro, M.D., and Dr. Eckhauser. Dr. Shapiro is an associate professor of surgery at St. Louis University Medical Center where he is director of both the intensive care unit and trauma service and assistant director of the emergency department. Dr. Shapiro is board certified in general surgery with special certification in critical surgical care from the American Board of Surgery. Dr. Eckhauser, Galayda's physician at Metro, where he is on the staff, is a general surgeon with a special interest in gastrointestinal surgery. He is board certified and a fellow in the American College of Surgeons.

Dr. Shapiro testified that to a reasonable degree of medical certainty Dr. Damian did not act within acceptable standards of care when he cared for Galayda in

several respects. First, Galayda should have been transferred to a level one trauma center from the Lake Hospital emergency room. Second, Dr. Damian should have responded more quickly to Dr. Glorioso's emergency call thereby arriving at the hospital sooner. Dr. Shapiro explained that with trauma patients, definitive care should occur within the "window" of sixty minutes; two and one-half hours after the injury is too long of a period of time. Third, an intra-operative cholangiogram should have been performed during the first surgery. The location of the bile staining indicated it originated from somewhere other than the liver lacerations as believed by Dr. Damian. According to Dr. Shapiro, a leak in the distal common bile duct would have been revealed and then repaired if Dr. Damain performed the cholangiogram. Fourth, a cholangiogram should have been performed during the second surgery. Finally, Dr. Damian should have investigated the source of the bile staining during the third surgery. Dr. Shapiro opined that if Galayda received appropriate treatment, the severe abdominal damage, infection and massive abdominal bleeding would have not occurred and none of the hospitalization and operations at Metro would have been necessary. He estimated that Galayda, under these circumstances, would have been hospitalized at Lake Hospital for two to three weeks with an additional home recovery period of six to eight weeks.

Dr. Eckhauser testified that in his opinion, to a reasonable degree of medical certainty, Galayda suffered from a bile duct leak throughout his entire three week stay at Lake Hospital. He further opined that the injury, which went untreated for those three weeks, was caused

by the June 18, 1988 automobile accident. Dr. Eckhauser's testimony mimicked that of Dr. Shapiro with regard to the cholangiogram, stating the procedure should have been performed during the first and second surgeries because the location of the bile staining indicated either common bile duct or duodenal injury and there was no evidence of the latter. Rather, the injury was not diagnosed because Dr. Damian did not perform the procedure. Consequently, the caustic bile spilled onto Galayda's abdominal organs directly leading to the damage of his pancreas, stomach, and small and large intestines. Dr. Eckhauser opined that if Galayda had received the appropriate treatment at Lake Hospital, he would have been released within a month and might have required outpatient physical therapy.

Dr. Eckhauser disagreed about the existence of the pancreatic pseudocyst. He testified that the area identified as a pseudocyst by Drs. Damian and Ferron was actually a collection of infected fluid that was not adequately drained by the drains.

Dr. Cohen also testified on behalf of Galayda. Dr. Cohen, as a diagnostic radiologist, is responsible for the placement of drains and catheters in the body to drain fluid collection or to drain blocked organs, and the sampling of fluids and tissues and the biopsy thereof.

Dr. Cohen performed an arteriogram upon Galayda's arrival at Metro. He thus examined arteries in the bowel, stomach and intestines to determine which arteries were bleeding and causing Galayda's loss of blood in the gastrointestinal tract. He discovered a blockage in the large artery on the bottom of the stomach, the gastro-epiploic

artery. The diagnosis enabled Dr. Eckhauser to plan surgery accordingly. Dr. Cohen offered that bile spilling into the abdominal cavity could cause blood vessels to block and clot.

Dr. Damian presented Donald Fry, M.D., a board certified general surgeon from Albuquerque, New Mexico, as his expert witness. Dr. Fry is Chairman of the Department of Surgery at the University of New Mexico.

Dr. Fry testified that the Kocher maneuver performed by Dr. Damian during Galayda's first surgery would have revealed the disruption of his common bile duct, if it was there. Moreover, Dr. Damian's decision to not perform a cholangiogram during the first surgery in order to expeditiously complete the operation was not outside the accepted standard of care. Dr. Fry found the liver lacerations to be a satisfactory explanation for the bile staining as claimed by Dr. Damian. Dr. Fry further testified that the pancreatic pseudocyst at the head of Galayda's pancreas which Dr. Damian identified, resulted from the trauma suffered by Galayda in the accident. The injury to the pancreas and the subsequent pseudocyst formations caused an inadequate blood supply to the stomach and intestines by clotting in the right gastro-epiploic artery. The organs thus died without an adequate blood supply. Dr. Fry continued his testimony by stating that the distal gastrectomy performed by Dr. Eckhauser carries the risk of common bile duct injuries. He finally opined that all of Galayda's complications stemmed from his original injury and were not the result of poor medical care and management.

Prior to the sustaining of his injuries, Galayda believed that he was in pretty good shape. He acknowledged that he took medication for high blood pressure for a couple of years and that he experienced a severe eye injury when he was a child while playing little league baseball. His vision was corrected with eyeglasses after the accident. In addition to soft ball, Galayda golfed, and bowled. Galayda further offered that he and a friend like to cook and put on clam bakes at their friends' homes. He described this activity as "I guess if you stretched your imagination you could call it a business."

Average physical activities for Galayda now consist of playing golf; minimal weight lifting; and helping with the "catering" business which produces no income.

Galayda further testified that he has two children, Beth and Andrew. His ex-wife, Cheryl, worked late on Thursday evenings so he would take care of them on that day from after school until around 8:00 p.m. and then again on every Sunday and every other weekend.

Galayda testified that he began his employment with Ohio Bell when he was eighteen years old as a splicer helper, a position which was described as being an apprentice to a cable splicer. After six months with Ohio Bell, Galayda became a member of the Communication Workers of America and was actively involved beginning in the 1970's.

Pertaining to the day of the accident itself and the following days at Lake Hospital, Galayda could not really recall what happened to him there. He remembered not being able to sit up in the emergency room and that he

was in pain, but the remainder of his stay was recounted as "very, very foggy memories."

After he was released from intensive care at Metro and placed in another room, Galayda described that the pain was excruciating; he laid around most of the time; he lost muscle tone; and "everything hurt." Between June 18, 1988 and September, 1988, he had nothing to eat or drink; he was fed through tubes placed into various parts of his body. By the time he was released from the hospital in November, he testified that he was feeling better and that he was either walking with crutches or a four-legged cane or walker. He was also changing the wound dressings by himself. According to Galayda, he and Dr. Eckhauser decided that it was best for his mental health that he return home and he was ultimately released on November 10, 1988.

Once at home, Galayda needed to be cared for by family and friends. He testified that his bedroom became a "nice little hospital" with an IV machine and a hospital bed. Ten days after his release, he was admitted back into the hospital because he developed an infection due to non-sterile procedures. After a brief stay, he returned home.

Galayda narrated a videotape which was shown to the jury. The videotape illustrated how he had to change the dressing on his abdominal wound. The procedure which in total approximated once hour needed to be completed four times a day. Galayda also had to manage his hyperaliementation bags which he was fed by for about fifteen hours in one evening.

During this period of recovery, Galayda depicted a normal day at home as sitting around the house, doing dressing changes and taking hyperal. Friends would visit him but he took many naps because he had no endurance. Moreover, he suffered from stomach cramps and muscle aches.

He was re-admitted to Metro in February due to an infection and then again in March when he developed an infection in his left eye. Treatment was unsuccessful and the infection eventually led to the removal of his left eye. Galayda now wears a false eye. The loss of his eye affected his depth perception to the point where he bumps into objects, trips over things and feels awkward in a big group of people. He was back at Metro in April for five weeks because of another infection and reconstructive surgery on his stomach and then again in July for another infection.

Galayda then visited with Ohio Bell personnel to discuss his return to work. Although he desired to return to work, Ohio Bell denied his return, commenting that he was not fit to return to any type of work. Galayda himself did not believe that he could return to Ohio Bell because of the loss of his eye and his sudden and frequent bowel movements. They occur from every three to four hours and sometimes every hour because of his inability to absorb water through his colon. He attempted to assist in contract negotiations with the union but decided his lack of concentration due to pain disallowed him from adequately representing any party.

During cross-examination, Galayda testified that he felt he could not return to Ohio Bell because he could no

longer perform the job duties as a cable splicer. He admitted, however, that he had not performed duties as a cable splicer for at least four to five years prior to his accident. Since his accident, Galayda did not seek employment even though Dr. Eckhauser never instructed him that he could not seek employment. Specifically, Dr. Eckhauser told Galayda in February, 1989 that he could go to work, *e.g.*, in a desk job, in his estimation by June 15, 1989.

A synopsis of Galayda's physical condition throughout his hospitalization and presently reveals: removal of a large portion of his large intestine; partial removal of his stomach; prolonged hyperalimentation; removal of a large amount of his small intestines; numerous and repeat operations for the removal of unhealthy tissue; insertion of catheters and feeding tubes; an infection which destroyed his left eye; loss of intestinal function to absorb and maintain nutrients; persistent diarrhea; and an abdominal wall hernia. His stomach was reconstructed to the point that he could resume eating solid foods in May, 1989. Galayda must, however, consume Zantac to reduce acid in his stomach and also between four to fifteen extra strength Tylenol tablets per day to control pain. Galayda incurred medical bills approaching $367,000 in total.

The issue of appellants' alleged negligence was then given to the jury for determination. In special interrogatories, the jury concluded that appellants failed to meet accepted standards of care in their treatment of Galayda by 1) failing to order a cholangiogram in any of his surgeries, and 2) failing to recognize the need for definitive treatment and transfer to a hospital capable of treating his injuries. The jury then concluded that the

failure to meet the accepted standards of care directly and proximately caused Galayda's injuries.

II.

Appellants timely appeal from the jury's verdict and the trial court's ruling on their post trial motions. They assert ten errors for review.[6] For the reasons set forth below, we affirm the judgment of the trial court.

III.

Appellants, for their first assignment of error, contend in a three-part argument, that the trial court erred in granting Galayda's March 5, 1991 motion *in limine* to exclude any reference to his alcohol consumption prior to his admission to Lake Hospital on June 18, 1988. Specifically, they first aver that the evidence of alcohol use was relevant in this case. Second, appellants suggest Galayda "opened the door" to the issue of alcohol use. Finally, they maintain that the admission of evidence pertaining to intoxication and alcohol use would not have been "trial by ambush."

Appellants' position is that damage to Galayda's abdominal organs, *i.e.*, the lack of blood supply thereto and their subsequent "death", was caused by pancreatic pseudocysts. In asserting that long term alcohol abuse was a cause of pancreatic pseudocysts, appellants stress that evidence of Galayda's alleged alcohol abuse directly

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[6] See appendix.

related to his subsequent medical complications. Appellants submit that Galayda was fully aware of this position prior to trial and, therefore, would not have been "ambushed" by it. They argue, therefore, the evidence was relevant and not outweighed by the danger of unfair prejudice.

Initially, it is noted that we reject appellants' allegation that Galayda "opened the door" during opening statement to the issue of his intoxication. The door was opened, according to appellants, when Galayda's counsel explained that Galayda fell asleep at the wheel and consequently hit the tree. Appellants argue that since Galayda opened the door to the cause of the accident, they had a right to introduce evidence on this issue, *i.e.*, intoxication caused the accident and the ensuing injuries.

Appellants attempt to cloud the issues before this court by focusing on intoxication as a cause of the accident. The cause of the motor vehicle accident is not an issue in this case. The standard of care afforded to Galayda for the injuries sustained in the accident and whether a violation of the standard was the proximate cause of the complications suffered by him were the sole issues before the jury and the sole issues before this court along with the trial court's rulings through trial and thereafter.

We thus point out that appellants' response to Galayda's motion *in limine* was inappropriate. They only argued that evidence of Galayda's alcohol consumption prior to the accident "gave rise to the affirmative defense of plaintiff's comparative negligence as to the cause of his injuries" without elaboration that alcohol consumption

was relevant to either standard of care or medical causation. Moreover, appellants did not mention alcohol as an issue in this case even in their trial brief as correctly noted by the court in its ruling on Galayda's motion *in limine*.

The record reveals that it was not until the morning of trial when requesting that the trial court reconsider its ruling, appellants made their "position" clear. They alleged that Galayda was a long-time alcohol user and this usage caused him to suffer from a post-accident pancreatic pseudocyst. The pancreatic pseudocyst in turn was responsible for his abdominal organ damage and not any care rendered to him by appellants.

A motion *in limine* seeks an anticipatory ruling that evidence will probably be inadmissible, so it should be excluded until the opponent demonstrates its propriety. *State v. Maurer* (1984), 15 Ohio St.3d 239, 259; *Brentson v. Chappell* (1990), 65 Ohio App.3d 83, 87. The ability of the trial court to entertain such a motion lies in the inherent power and discretion of the trial judge to control the proceedings. *Brentson*, 87.

Pursuant to Evid.R. 402, the admission or exclusion of relevant evidence thus rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. "Relevant" evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401; *State v. Tolliver* (1984), 16 Ohio App.3d 20. Moreover, the trial court is vested with broad discretion in determining whether relevant evidence should be excluded

due to the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 403(A), (B); *State v. Harcourt* (1988), 46 Ohio App.3d 52.

The proffered testimony of Cheryl Galayda, Galayda's former wife, included a denial of any history of heavy drinking in Galayda's family. She testified that during their marriage, he had a drink "maybe a couple of times per week" and maybe two to ten drinks at a sitting. Cheryl expressly stated, however, that Galayda did not have a drinking problem.

Ed Phillips, Galayda's friend and co-worker, testified that in his opinion, Galayda was a moderate to heavy drinker. He offered that the two of them would meet once a week and have a drink or two.

Kathleen Quinn, M.D., a psychiatrist at Metro, performed a psychiatric evaluation of Galayda. The evaluation's purpose was to determine whether "there was any mental health or emotional component or aftermath of his injuries and recovery from his June 1988 automobile accident." Dr. Quinn's proffered testimony at trial included the following:

> "Q. Did you obtain any history with regard to alcohol use or booze in the years preceding this accident?
>
> "A. Yes.
>
> "Q. What did he tell you about his history with alcohol?
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> "A. * * * he described his alcohol use as variable, ranging as often as on a daily basis, ranging from none to several drinks per day.

"Q. Have you been made aware of any of the testimony from other witnesses, friends of Mr. Galayda's, about Mr. Galayda's alcohol consumption prior to this accident in the years preceding it?

"A. No.

"Q. Mr. Phillips, a friend of Mr. Galayda's, testified yesterday also in a proffer out of the presence of the jury that Mr. Galayda was a moderate to heavy drinker; did you obtain that history from Mr. Galayda?

"A. The history that he would have described, I would describe more as to a moderate to a mild drinker."

Upon cross-examination, Dr. Quinn testified that if a person does have an alcohol problem, he or she might attempt to conceal the problem. However, the fact remains that Dr. Quinn could offer no evidence that Galayda consumed more alcohol than what he related or that he was a long term alcohol user.

The evidence attempted to be introduced by appellants pertaining to alcohol consumption is not relevant to any issues in this case. The testimony proffered at trial failed to support appellants' strained connection between Galayda's alleged alcohol consumption, accorded long-term use status by appellants, and his injuries. The evidence thus has no tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence and thus was excludable under Evid.R. 401, 402.

Appellants' first assignment of error is overruled.

IV.

In their second assignment of error, appellants assert that the trial court erred in allowing Dr. Cohen, over objection, to testify as to a new opinion at trial. At Dr. Cohen's deposition appellants questioned him with regard to the placement of surgical clips during Galayda's gastrectomy at Metro. Appellants' theory was that the surgical clips were placed in the area of the common bile duct and may have led to the damage of that duct.

Appellants' expert, Dr. Fry, in a report dated March 21, 1990 commented that Galayda "did develop clear evidence of a bile leak although this occurred after the subtotal gastrectomy and becomes problematic as to when the duct injury occurred." Thus, at his deposition, Dr. Fry testified that it was impossible for him to identify within reasonable medical probability the source of the leak.

Galayda reacted to this ambiguous testimony by notifying appellants of his intention to call Dr. Cohen as a witness because Dr. Cohen performed diagnostic testing on Galayda prior to and after the gastrectomy. Appellants then deposed Dr. Cohen. Dr. Cohen testified as follows during that deposition:

> "Q. You can't tell from these films where they [the surgical clips] exactly appear?
>
> "A. From that particular set of films, no. There are ways to tell, but not from that particular set.
>
> "Q. Did you do any kind of review of any films to try to localize those clips?

"A. There would be no reason to have done that, and the time I did this – to try to do that from this study.

"Q. Have you done it since then?

"A. No."

Prior to Dr. Cohen taking the stand, appellants objected to any testimony given with relation to a different set of films than those used during the deposition. The trial court overruled this objection and Dr. Cohen proceeded to testify as follows:

" * * * And thirdly, after the prior deposition, I went looking at the CT scan from our institution again to see if I couldn't be very accurate on exactly where the surgery was, and there's some clips on that CT film which I found subsequently, which lead me to the exact location of the surgical procedure, which is at least a couple inches away from where that leak is at, the closest, and you – it is also separated by tissue that you would not go through, namely the duodenum.

"You would not. Dr. Eckhauser would have known if he had cut through the duodenum or the pancreas to get to that location."

Appellants' objection to the testimony in which they argued it was a substantive change from the deposition testimony was overruled by the court. They now request that this court find that the allowance of this testimony amounted to "trial by ambush" in violation of the rules of discovery.

Appellants chose to have Dr. Cohen read the cholangiogram films during his deposition. He did so

stating that it was impossible to tell from these particular films the placement of the surgical clips in relation to the common bile duct. Appellants were aware that three dimensional CT scans were taken of the same depiction and yet chose not to have Dr. Cohen interpret the CT scans. There was no change in his testimony or in his opinion.

We note that Dr. Cohen's trial testimony was not a substantial change from his deposition testimony. Dr. Cohen offered his opinion both at his deposition and at trial that the common bile duct leak was present when Galayda was at Lake Hospital and that it was caused by the motor vehicle accident. Dr. Cohen used a different set of films at trial to illustrate his point and buttress his opinion. Cf. *Ramage v. Central Ohio Emergency Service* (1992), 64 Ohio St.3d 97 (where plaintiff's expert allowed to interpret x-ray not interpreted during his deposition because the expert did not present a new theory of liability). He informed appellants that it was impossible to tell from the cholangiogram films what it was that appellants wanted to know; appellants could easily have had Dr. Cohen then interpret the CT scans. Maybe then they would not have been tempted to argue on appeal that they were "ambushed" by the trial testimony. We find no evidence of unfair surprise in Dr. Cohen's testimony as the information provided by his testimony was all discoverable prior to trial. See, *Savage v. Correlated Health Serv., Ltd.* (1992), 64 Ohio St.3d 42, 47.

Accordingly, appellants' second assignment of error is overruled.

V.

Galayda moved *in limine* during trial seeking to bar Dr. Fry from testifying about appellants' related defense theory that gastrectomy surgeries carry the risk of causing common bile duct injuries. He based this motion on Dr. Fry's inability to state to a probability that Dr. Eckhauser injured the common bile duct during Galayda's gastrectomy. Dr. Fry raised it as a logical explanation in his deposition and would have testified that "the site of the leak was in high probability for common bile duct injury in gastrectomy surgery."

Appellants, in their third assignment of error, aver that the trial court erred in granting Galayda's motion. They argue that although a plaintiff bears the burden of proving defendants were negligent, the defendants are not required to prove they were not negligent. The case of *Conti v. Topolosky* (June 17, 1975), Franklin App. No. 74AP-515, unreported,[7] is quoted in support of their position as follows:

> "If a malpractice plaintiff has introduced evidence to show the probability of the occurrence of an event, a malpractice defendant need not be limited to showing probability that the event did not occur; instead, the malpractice defendant may be allowed to demonstrate that such probability as shown by plaintiff is neither a certainty, nor a great probability and defendant may attempt to do this by using 'possibility' evidence to chip away and destroy the evidence set forth by plaintiff."

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[7] Appellants fail to provide a copy of this unreported opinion to this court in violation of Loc. App.R. 19.

We interpret *Conti* differently from the appellants. This quoted passage demonstrates how a defendant can react to the plaintiff's evidence as to the probability of an occurrence. The defendant can offer possibility evidence to refute the probability *as shown by plaintiff,* is not as probable as the plaintiff claims.

Here, appellants were not chipping away at Galayda's evidence that the common bile duct injury was caused by the motor vehicle accident. Appellants were attempting to present a different cause rather than trying to demonstrate that the motor vehicle accident was not the probable cause of the common bile duct injury. Hence, we find *Conti* to not be applicable to the present circumstances.

A court's ruling concerning the admissibility of expert testimony will not be disturbed on appeal absent a showing of abuse of discretion. *Frank v. Vulcan Materials Co.* (1988), 55 Ohio App.3d 153.

We find no abuse of discretion in the trial court's ruling pertaining to the grant of Galayda's motion *in limine.* In overruling appellants' third assignment of error, we note that this testimony was to a certain extent allowed into evidence despite the trial court's ruling

VI.

Appellants submit in their fourth assignment of error that the trial court erred in awarding prejudgment interest to Galayda. They argue that the award was improper because they had a good faith, objectively reasonable

belief they had no liability and/or Galayda failed to engage in good faith settlement offers.

R.C. 1343.03(C), which allows the award of prejudgment interest as based upon a judgment, provides:

> "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

The Supreme Court of Ohio, with regard to the award of prejudgment interest, has established that:

> "A party has not 'failed to make a good faith effort to settle' under R.C. 2343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

Kalain v. Smith (1986), 25 Ohio St.3d 157, syllabus.

Moreover, the decision as to whether a party has failed to make a good faith effort to settle pursuant to

R.C. 1343.03(C) is a matter left to the sound discretion of the trial court. *Id.*, 159, citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83. See, also, *Worrell v. Multipress, Inc.* (1989), 45 Ohio St.3d 241; *Cox v. Fisher Fazio Foods* (1984), 13 Ohio App.3d 336. The term "abuse of discretion" involves more than just an error of law or judgment. It constitutes a judgment which is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

Contrary to appellants' contention that *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, should be applied to the facts of this case, specifically the issue of good faith, the standards set forth in *Kalain* and *Huffman* are controlling. See, *e.g.*, *Ross v. Bd. of Edn. of Solon City School District* (July 2, 1992), Cuyahoga App. Nos. 62978, 63020, unreported; *Ramos v. Kuzas* (Feb. 13, 1992), Cuyahoga App. Nos. 60932, 60495, unreported.

In the present case, a review of the record fails to disclose that the trial court's grant of Galayda's motion for prejudgment interest constituted an abuse of discretion. The court held a hearing and heard competent, credible evidence to substantiate the award.

The trial court first analyzed both parties' experts' deposition and trial testimony in evaluating whether appellants had objectively and reasonably weighed the risk of potential liability. Appellants' expert, Dr. Fry, testified at deposition and at trial with regard to whether Dr. Damian should have performed an intra-operative cholangiogram on June 18, 1988. His trial testimony follows:

"Q. So, on June 18, during the course of the surgery, you would have done a cholangiogram?

"A. I said that, I think, seven times in my deposition.

" * * *

"Q. Isn't it true that a majority of the general surgeons, a clear majority of the general surgeons faced with this same circumstance would have done an intra-operative cholangiogram?

"A. I believe I said that also, yes, sir.

"Q. And so the standard of care, the clear standard of care at the time that Dr. Damian did that first surgery was to do an intra-operative cholangiogram?

"A. I think the standard of care has to be individualized to the circumstances of each patient's circumstance.

"Q. Well, I asked you about this specific circumstance in your deposition, and I am asking you now, under these specific circumstances, Dr. Frye [*sic*], the standard of care which was applicable to Dr. Damian as it was to every other general surgeon in this country would have been to do an intra-operative cholangiogram, isn't that correct?

"A. That is correct."

Dr. Fry continued with his testimony, stating that if he had not performed the cholangiogram during the first surgery at Lake Hospital, the cholangiogram would have been performed during the second surgery.

A review of the deposition of Jonathan Glauser, M.D. was also conducted by the trial court. Dr. Glauser was

asked to refer to a report dated April 5, 1990, completed after a review of Galayda's records from Lake Hospital and Metro. In that report, Dr. Glauser opined that the liver laceration, diaphragm, mesenteric, pancreatic, and the bile duct injuries all resulted from the car accident.

Therefore, not only were the appellants presented with expert opinions from Galayda's witnesses, Drs. Eckhauser, Shapiro and Cohen, that his injuries resulted from the motor vehicle accident and Dr. Damian should have performed a cholangiogram during the first surgery. Their own witnesses provided, in essence, these same opinions which contradicted appellants' theory that alcohol consumption led to pancreatic pseudocysts which in turn led to a bile duct leak and, therefore, the failure to perform a cholangiogram did not fall below acceptable standards of medical care and proximately cause ensuing complications. Based upon this evidence alone, we decline to accept appellants' proposal that they held a reasonable and objective belief they were not liable for Galayda's injuries.

The trial court then studied how appellants evaluated their potential risks. Testimony at the hearing revealed that appellants' insurance carrier presented the claim to its "Peer Review Committee" ("the committee") once only on February 21, 1990. The initial decision was to offer no settlement figure. The committee thus did not reconvene after the expert opinions were obtained by the parties. A week before trial, the carrier's board of directors met and reviewed the matter and affirmed its "no pay" stance. The trial court determined that this "no pay" stance was inconsistent with a report of the carrier which alerted the carrier's re-insurance company to "the trial

because of the potential for a plaintiff's verdict." Moreover, the trial court recognized a letter penned by Mario Ciano, personal and corporate counsel to appellants, on July 9, 1991, in which he urged appellants to take part in "meaningful" settlement negotiations and recommended a settlement figure. He further commented that by not offering any settlement figure to Galayda, Galayda had no reason to budge from his settlement offer. Appellants, however, failed to accept Ciano's advice and never offered a settlement figure to Galayda.

Appellants suggest that the trial court stopped its analysis at this point without addressing whether Galayda made a good faith effort to settle the case. We direct appellants to the trial court's journal entry with regard to his ruling on the R.C. 1343.03(C) motion. The court expressly stated, "[i]t is of course necessary for plaintiff to have made a good faith offer to settle the case" and then continued:

> " * * * Plaintiff submitted into evidence letters to defense counsel dated May 7 and May 14, 1991 in which the demand of $5,000,000.00 was reiterated and which defense counsel was urged to enter into meaningful settlement discussions. In addition, plaintiff's counsel met with Mr. Ciano to discuss the matter and no doubt urged his intervention in an effort to elicit some kind of offer. In pretrial discussions this court also discussed settlement with both sides and made no progress. It was apparent at that time that plaintiff's demand would be reduced substantially if a reasonable offer would be made but that plaintiff was unwilling to 'bid against himself.'

> "The court finds that defendants stated their position of no offer and no settlement in such unmistakably rigid terms that plaintiff's presentation of any reduced demand would have been a vain act. The subsequent verdict of almost $3,000,000.00 demonstrates that the original demand of $5,000,000.00 was not absurd. Plaintiff's obligation under *Kalain* was to make a good faith offer and to respond in good faith to an offer from the other side. Since no offer was made, plaintiff was precluded from an opportunity to respond in good faith. The court finds that when defendants closed the settlement door, they effectively terminated all chance for a good faith negotiation. Defendants decreed that a trial was the only path to resolution."

Based upon the foregoing, and *Kalain* and *Huffman*, we find no abuse of discretion in the trial court's decision to award prejudgment interest to Galayda. Appellants' fourth assignment of error is overruled.

VII.

Appellants acknowledge that R.C. 1343.03(C) does not violate the right to a jury trial. See, *Kalain; Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App.3d 222. They contend, however, in their fifth assignment of error, that the constitutional statute operated unconstitutionally in this case, *State v. Wetzel* (1962), 173 Ohio St.16, by violating appellants' right to jury trial because there was a good faith defense.

We fail to recognize any constitutional violation as alleged by appellants based upon our resolution of their fourth assignment of error, and *Kalain* and *Hardiman*.

Appellants' fifth assignment of error was overruled.

VIII.

Appellants, for their sixth assignment of error, present a three-part argument in which they contend that the trial court inappropriately denied their motion for periodic payments of future damages under R.C. 2323.57. Specifically, they first find error with the trial court's ruling that the statute is discretionary. Second, they submit the court incorrectly found the statute in violation of due process as being unreasonable and arbitrary with no reasonable relationship to the legislative goal. Finally, appellants suggest that the court erred in finding the statute violated the right to jury trial guaranteed by Section 5, Article I, of the Ohio Constitution.

In our review of the nature of R.C. 2323.57, we are guided by the following:

> "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation. *Meeks v. Papadopulos* (1980), 62 Ohio St.2d 187, 190 [citations omitted], citing *Sears v. Weimer* (1944), 143 Ohio St. 312 [citations omitted], paragraph five of the syllabus. However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent. *Meeks, supra,* 62 Ohio St.2d at 190 [citations omitted]; *Henry v. Central Natl. Bank* (1968), 16 Ohio St.2d 16 [citations omitted]; *Carter v. Youngstown* (1946), 146 Ohio St. 203 [citations omitted]; *Commercial Credit Co. v. Schreyer* (1929), 120 Ohio St. 568 [citation omitted]."

Cline v. Ohio Bur. of Motor Vehicles (1991), 61 Ohio St.3d 93, 96.

Further, in Ohio, it is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106. Courts are directed to give effect to the words of a statute and not to modify an unambiguous statute by deleting words used or inserting words not used. *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4.

The statute at issue here, R.C. 2323.57, provides, in relevant part:

> "(B)(1) In any civil action upon a medical * * * claim that is tried to a jury and in which a plaintiff makes a good faith claim against the defendant in question for future damages that exceed two hundred thousand dollars, * * * the court shall instruct the jury to return, * * * , a general verdict and, if that verdict is in favor of the plaintiff, answers to interrogatories that shall specify all of the following:
>
> "(a) The past damages recoverable by that plaintiff;
>
> "(b) The future damages recoverable by that plaintiff,
>
> " * * *
>
> "(C) If answers to interrogatories are returned or findings of fact are made pursuant to division (B) of this section and if the total of the future

> damages described in division (B)(1)(b) of this section exceeds two hundred thousand dollars, then, at any time after the verdict or determination in favor of the plaintiff in question is rendered by the trier of fact but prior to the entry of judgment * * * the plaintiff or the defendant in question may file a motion with the court that requests the court to include an order in the journal entry that the future damages in the excess of two hundred thousand dollars shall be paid in periodic payments rather than in a lump sum. *If such motion is timely filed, the court shall include in the journal entry an order that includes all of the following:*
>
> "(1) A requirement that the first two hundred thousand dollars in future damages be paid in a lump sum * * *
>
> " * * * *
>
> "(2) A requirement that the future damages in excess of the two hundred thousand dollars paid in a lump sum * * * be used to fund a series of periodic payments over a period of time * * * ." (Emphasis added.)

We find that R.C. 2323.57 is express in its terms that if a party timely files a motion pursuant to the statute, requesting that future damages in excess of $200,000 be awarded through a periodic payment plan, the trial court *shall* order such a periodic payment plan. The use of the word "shall" by the General Assembly connotes the mandatory nature of the statute. *Crawford v. Ohio Div. of Parole & Community Serv.* (1991), 57 Ohio St.3d 184, 189. "Since the wording of the 'statute in question' is clear and unambiguous, there is no room for judicial interpretation." *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 218.

Galayda refers to subsection (D)(1)(d) of the statute where it is stated, "[t]he court may modify, approve, or reject any submitted periodic payments plan," in arguing that this provision allows a court to deny a party's motion for a periodic payment plan. However, a reading of subsection (D) reveals that this portion of the statute outlines that either party may submit a periodic payment plan to the court for approval once a party files a motion under subsection (C). If submitted, the court has the discretionary ability to modify, approve or reject these submitted periodic payment plans. The court, however, does not have the discretion to deny the motion as discussed *supra;* it merely has discretion to determine the periodic payment plan.

The trial court's ruling in this case that ordering periodic payments in accordance with R.C. 2323.57 is a discretionary decision contradicts the express wording of the statute. The trial court thus erred in this ruling.

We now turn to the constitutionality of R.C. 2323.57 by first stating one of its purposes:

> "The adoption of plans for periodic payment of judgments in R.C. 2323.56 [allowing such plans in civil actions for injury to persons, excluding certain types of actions, including medical claims as defined in R.C. 2305.11(D)] and R.C. 2323.57 was designed to bring the payment of large future damage awards in tort actions in line with 'the increasingly common use of structured settlements.' Darling, *Ohio Civil Justice Reform Act,* p. 150 (1987). Enactment of these two statutes was 'intended to encourage litigants and counsel to consider structured settlements in cases involving large future damages

> and to permit courts to enter judgments which may avoid some of the uncertainties and inequities inherent in lump-sum awards.' Darling, *Ohio Civil Justice Reform Act*, p. 151 (1987)."

Bauer, *Periodic Payment of Judgments in Ohio*, Ohio Civil Practice Journal, Vol. 2, Issue 6, 158, 159.

"A legislative enactment will be deemed valid on due process grounds ' * * * [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.' " *Mominee v. Scherbarth* (1986). 29 Ohio St.43 270, 274, quoting *Benjamin v. Columbus* (1957), 167 Ohio St. 103, paragraph five of the syllabus. See, also, *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300. "Consequently, the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective. (Citation deleted.) *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115, 119 [11 O.O.3d 290, 293, 387 N.E.2d 231, 234]." *Schwan*, 301.

In the present case, we have not been presented with any evidence that periodic payment plans either encourage utilization of structured settlements or that such plans avoid the uncertainties and inequities of lump sum awards. See, Bauer, 159. Moreover, there is no evidence that there is a rational connection between periodic payment plans and malpractice insurance rates. In *Morris v. Savoy* (1991), 61 Ohio St.3d 684, the Supreme Court of Ohio noted there was no evidence of a rational connection between a $200,000 cap on awards and malpractice insurance rates. *Morris*, 690. In essence, the periodic payment plan places a cap on payments by allowing only a

certain amount of the total damages awarded to be doled out pursuant to a time schedule. If there is no evidence of a rational connection between a cap on the total damages to be awarded and malpractice insurance rates, we fail to recognize a rational connection between a periodic cap and such rates.

In addition, just as in *Morris* and *Mominee*, " ' * * * it is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice * * * ." *Morris*, 691, quoting *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported. The statute " * * * eradicates the right to a remedy by due course of law for certain injuries * * * [committed] by a certain favored group of tortfeasors." *Kansas Malpractice Victims v. Bell* (Kan. 1988), 757 P.2d 251, 264.[8]

This favored status is further illustrated by a comparison of R.C. 2323.57 and R.C. 2323.56. R.C. 2323.56, as stated *supra*, provides for a periodic payment of future damages in tort cases other than medical claims. Pursuant to R.C. 2323.56, a trial court is required to hold a hearing and to consider six factors in determining the propriety

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[8] In *Kansas Malpractice Victims v. Bell* (Kan. 1988), 757 P.2d 251, the court found legislation which required that an award for future damages be invested in an annuity for installment payments violated both an individual's right to jury trial and the right to due process required by the state constitution. The court further found that a cap on damages recovered in medical malpractice actions was unreasonable and arbitrary just as the Supreme Court of Ohio found in *Morris v. Savoy* (1991), 61 Ohio St.3d 684.

of a periodic payment plan. The factors address the benefits a plaintiff will receive through the payment plan. R.C. 2323.56(D)(2)(a) through (f). The trial court is thus first afforded the discretion not to order such a plan in contrast to the mandatory nature of R.C. 2323.57. Moreover, the trial court concerns itself with the benefits enured to the plaintiff when considering a R.C. 2323.56 payment plan. The tortfeasor in a medical malpractice case obtains the benefit from a R.C. 2323.57 payment plan because the plaintiff has no right to object to a plan and thereby no right to argue he will not benefit from the plan. Finally, as correctly noted by the trial court, R.C. 2323.56 provides for interest on unpaid portions of a judgment, R.C. 2323.56(E)(1)(d), whereas no such interest provision is written into R.C. 2323.57.

This court thus finds that upon a review of R.C. 2323.57, it is apparent that the periodic payment plan afforded by the statute infringes upon a medical malpractice victim's constitutional right to a remedy by due process of law. The trial court's ruling that R.C. 2323.57 is unconstitutional based upon due process grounds is, therefore, correct.

Although we are not called upon to address whether the statute violates the equal protection clause, we note with interest the following passage in *Jeanne v. Hawkes Hosp. of Mt. Carmel* (1991), 74 Ohio App.3d 246:

> " 'There is no statutory reason for this separate and unequal treatment. There obviously is "no compelling governmental interest" unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To

articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution. Even remaining within the area of the professions, it is notable that the special consideration given to the medical profession by these statutes [which impose caps on medical malpractice awards] is not given to lawyers or dentists or others who are subject to malpractice suits.

" 'Additionally, assuming a valid legislative purpose to enact laws relating to protection of the public health, this legislation may be counter-productive. The extending of special litigation benefits to the medical professions certainly cannot be considered as relating to protection of the public health. On the contrary, the quality of health care may actually decline. To the extent that in tort actions of the malpractice type if the medical profession is less accountable than formerly, relaxation of medical standards may occur with the public the victim.

" 'Courts of course, may not invalidate legislation merely because is it perceived as unwise. Here there is a transgression of a basic constitutional principle forbidding unequal and special treatment for a class with no general beneficent reason apparent.' "

Id., 255-256, quoting *Graley v. Satayatham* (1976), 74 O.O.2d 316, 320.

With regard to the right to jury trial, such right is guaranteed by Section 5, Article I, of the Ohio Constitution. The legislature may not attempt to either limit or abolish the right to a trial by jury. See, *Gibbs v. Girard* (1913), 88 Ohio St. 43. The right to have a jury determine the amount of damages is a substantive right not to be abridged by any action. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354.

In enacting R.C. 2323.57, the legislature effectively limits a plaintiff's access to the damages awarded by the jury. The moment the jury awarded Galayda his damages, he was entitled to them albeit an appeal was filed by appellants. R.C. 2323.57 thus interferes with his right to have damages determined by the jury, and therefore, his constitutional right to a trial by jury. See, *Kansas Malpractice Victims*, 258.

For these reasons, the periodic payment of a malpractice victim's judgment, authorized by R.C. 2323.57, violates the right to trial by jury guaranteed by Section 5, Article I, of the Ohio Constitution. The trial court accurately found this statute unconstitutional, not only on due process grounds, but on an individual's right to jury trial.

Appellants' sixth assignment of error is overruled.

IX.

Appellants, for their seventh assignment of error, posit that the trial court erred in denying their motion for new trial. They argue that the $1,981,710 future damages

award resulted from the influence of passion and prejudice, misconduct of Galayda's counsel and testimony with regard to speculative damages. Appellants urge this court to reverse the future damages award and order a new trial.

Civ.R. 59(A) provides in pertinent part:

> "(A) Grounds. A new trial may be granted to all or any of the parties and all or part of the issues upon any of the following grounds:
>
> " * * *
>
> "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice."

The granting of a motion for new trial rests in the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal unless there has been an abuse of that discretion. See, *Poske v. Mergl* (1959), 169 Ohio St. 70; *Verbon v. Pennese* (1982), 7 Ohio App.3d 182. In an action for damages for personal injury, a jury's verdict should not be set aside unless the damages were awarded under the influence of passion or prejudice. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28; *Jones v. Meinking* (1987), 40 Ohio App.3d 45; *Litchfield v. Morris* (1985), 25 Ohio App.3d 42.

The presence of passion or prejudice is not merely proven by the size of a verdict. *Pearson v. Cleveland Acceptance Corp.* (1969), 17 Ohio App.2d 239. In *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, the court enunciated the following standard to be utilized when reviewing whether a verdict was influenced by passion or prejudice:

> "In order to determine whether excessive damages were so influenced, a reviewing court should consider, not only the amount of damages returned and the disparity between the verdict and remittitur where one has been entered, but it also becomes the duty of such court to ascertain whether the record discloses that the excessive damages were induced by (a) admission of incompetent evidence, (b) by misconduct on the part of the court or counsel, or (c) by any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded."

Id., 569; see, also, *Loudy v. Faries* (1985), 22 Ohio App.3d 17.

The rule in Ohio with respect to future damages is that, "a jury should be confined to such damages as are reasonably certain to follow from the injury complained of." *Roberts v. Mut. Mfg. & Supply Co.* (1984), 16 Ohio App.3d 324, paragraph one of the syllabus.

Appellants in the present case direct this court's attention to the following evidence admitted at trial. Galayda only takes extra-strength Tylenol[9], he watches television, walks, visits friends, travels, and plays golf. Further, although he was not allowed to return to Ohio Bell, Dr. Eckhauser never told him that he could not return to work in some format. Yet, Galayda chose to not seek employment after the accident and ensuing medical

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[9] There was testimony that Galayda takes Zantac in order to control the level of acid in his stomach.

treatment. Dr. Quinn testified that Galayda currently suffered no depression and that he was well-adjusted with regard to his experience.

Finally, appellants point to that portion of the record where Dr. Eckhauser testified that, "he could be, at some point, a gastrointestinal cripple."[10] They suggest that Dr. Eckhauser's prejudicial testimony was then exacerbated when appellants' counsel picked up this comment and relayed it to the jury once again in closing argument.

We, however, must acknowledge that Galayda has undergone an enormous amount of pain and suffering having been in hospitals for a lengthy period of time and that he still suffers from the effects of the removal of his abdominal organs. We also acknowledge that appellants fail to quote that portion of Dr. Eckhauser's opinion which mentions "reasonable medical certainty" and that portion reads:

> "A. It [Galayda's digestive system] will look like this unless he develops a bowel obstruction or some other problems that would require not only dividing the scars that block the bowel, but should he ever require anymore bowel be taken out, he could be at some point a gastrointestinal cripple.
>
> "Q. Is that opinion based upon a reasonable medical certainty?
>
> "A. Yes, it is."

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[10] We note that appellants failed to object to this comment at trial.

Galayda relieves the pain he must endure by taking up to sixteen Tylenol tablets a day. He lacks abdominal muscles and suffers from intense stomach cramping and diarrhea, oftentimes spending a whole day on or near a toilet. As a result of the loss of much of his intestines, Galayda defecates within an hour of eating and urinates quickly after drinking. Moreover, he experiences exhaustion and a lack of concentration. Finally, Galayda wears a prosthesis in his left eye socket and consequently has a loss in his depth perception and peripheral vision. Overall, his economic expert estimated that the present value of his lost future earnings was between $854,685.90 and $752,607.70.

This court thus finds that the jury award of $1,981,710, consisting of $1,396,125 for future pain and suffering and $585,585 for lost future earnings, is amply supported by the record.

Appellants' seventh assignment of error is overruled.

X.

Appellants, in their eighth assignment of error, assert that the trial court erred by not reducing Galayda's judgment by the total value of his Social Security benefits and Ohio Bell disability plan payments.

Appellants first contend that the "Ohio Supreme Court has *not* conclusively determined whether Social Security benefits fall under the definition of insurance." (Emphasis *sic.*) They correctly cite the dispositive cases on this issue, *Savage*, and *Stelma v. Juguilon* (1992), 73 Ohio App.3d 377, but misread *Savage*.

In *Hodge v. Middletown Hosp. Assn.* (1991), 62 Ohio St.3d 236, the Supreme Court of Ohio held that Medicare Part A benefits do not reduce medical malpractice awards because they fall under the definition of insurance. *Id.*, syllabus. Moreover, in *Morris*, workers' compensation benefits were likewise found to be incapable of being set-off against a damage award. *Id.*, 61. The court in *Savage* compared Social Security benefits to both workers' compensation and Medicare Part A benefits "in that all such benefits constitute (within the meaning of R.C. 2305.27) ' * * * insurance proceeds or payments or other benefits paid under any insurance policy or contract where the premium or cost of such insurance policy or contract was paid either by or for the person who has obtained the award, or by his employer, or both * * * .' " *Savage*, 49.

Social Security benefits are payments under an insurance contract with the employer and employee paying the premiums and do not constitute income. *Stelma*, 387-388. The court in *Stelma* agreed with the analysis set forth in *Morris* with regard to workers' compensation benefits and concluded that "social security benefits do not constitute a collateral source which must be used to reduce plaintiff's award of damages." *Id.*, 388.

Thus, both *Savage* and *Stelma*, contrary to appellants' reading of them, expressly and boldly hold that "Social Security benefits fall under the definition of 'insurance' in R.C. 2305.27, and therefore do not reduce medical malpractice damages awards." *Savage*, 49.

Appellants next submit that they were entitled to have the judgments reduced by Galayda's Ohio Bell disability payments because they do not constitute

"insurance." They presented the following argument in the brief in support of their motion for set-off:

> " * * * Plaintiff testified that he was one hundred percent (100%) vested in the Ohio Bell Disability Plan before his accident on June 18, 1988. The present value of these benefits are Two Hundred Fifty-three Thousand Ninety-Seven Dollars ($253,097.00). Plaintiff is adjudged totally disabled, and thus, entitled to disability payments through his life expectancy of age 75.3 years of age. Plaintiff would receive these disability payments *regardless* of whether he ever filed this case. Therefore, Defendants are entitled to a set-off and reduction of judgment for disability payments in the amount of Two Hundred Fifty-three Thousand Ninety-Seven Dollars ($253,097.00)." (Emphasis *sic.*)

This argument points out the futility of appellants' argument on appeal. R.C. 2305.27 is directed toward a party who recovers a double payment for injuries sustained in a tort action. Galayda had a vested interest in the disability plan and as appellants point out, he would have received the disability payments regardless of whether he sustained any injuries as a result of any care rendered to him by defendants. The disability payments do not, therefore, constitute a second recovery for the injuries and are not to be used to reduce the jury's award of damages.

Accordingly, appellants' eighth assignment of error is overruled.

XI.

In their ninth assignment of error, appellants submit that Galayda's counsel's comments during closing argument violated DR7-106(C)(4) and (6), and amounted to misconduct warranting a new trial. This court is directed to counsel's alleged inferences that Dr. Damian and defense counsel suppressed the truth; Dr. Damian lied and deceived the jury; and the defense's case was a "script". Appellants argue these comments improperly addressed the credibility of the witnesses' testimony and suggested the defense engaged in "dishonest trickery in the trial."

In *Lang v. Minch* (1990), 53 Ohio St.3d 186, the Supreme Court of Ohio held:

> "It is axiomatic that great latitude is afforded counsel in the presentation of closing argument to the jury. *State v. Champion* (1924), 109 Ohio St. 281, 289, 142 N.E. 141, 143. See, also, *State v. Woodards* (1966), 6 Ohio St.2d 14, 26, 215 N.E.2d 568, 578. Included within the bounds of permissible argument are references to the uncontradicted nature of the evidence presented by the advocate. *State v. Ferguson* (1983), 5 Ohio St.3d 160, 5 OBR 380, 450 N.E.2d 265, paragraph one of the syllabus; *State v. Champion, supra.* The assessment of whether these bounds have been exceeded is, in the first instance, a discretionary function to be performed by the trial court. *Ohio v. Western Pennsylvania Dock Co. v. Trapnell* (1913), 88 Ohio St. 516, 521, 103 N.E. 761, 763; *Legg v. Drake* (1853), 1 Ohio St. 286, 288. Such determination will not be reversed on appeal absent an abuse of discretion. See *Breuning v.*

Russell (1960), 170 Ohio St. 444, 446, 11 O.O.2d 200, 201, 166 N.E.2d 240, 242.

This court further recognized:

" 'The determination of whether alleged misconduct of counsel was sufficient to taint the verdict with passion or prejudice ordinarily lies within the sound discretion of the trial court. *Lance v. Leohr* (1983), 9 Ohio App.3d 297, 298. "Before a reviewing court will disturb the exercise of the trial court's discretion, the record must clearly demonstrate highly improper argument by counsel which tends to inflame the jury." *Id.*, at 298.' "

Jackson v. Booth Memorial Hosp. (1988), 47 Ohio App.3d 176, 180, quoting *Acceleration Life Assur. Co. v. Walsh* (June 4, 1987), Cuyahoga App. No. 52266, unreported.

Although we note that counsel's comments were improper in that they represented his personal opinions, we do not find that the comments had any tendency to inflame the jury. For this reason, we overrule appellants' ninth assignment of error.

XII.

For their tenth and final assignment of error, appellants contend that the cumulative effect of errors throughout trial and thereafter denied them a fair trial. They argue, therefore, the cumulative effect mandated a remand and new trial.

We overrule appellants' tenth assignment of error since they are not entitled to a new trial based upon cumulative error. See, *Stelma; Dawson v. Cleveland Metro.*

Gen. Hosp. (Nov. 20, 1986), Cuyahoga App. Nos. 51032, 51779, unreported, 1986 WL 13323. This court finds that the trial court committed no errors at trial as argued by appellants.

Judgment affirmed.

It is ordered that appellee recover of appellants his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

LEO M. SPELLACY, P.J., and
PORTER, J., CONCUR.

/s/ Sara J. Harper
SARA J. HARPER
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX

"ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED BY DENYING DEFENDANTS THE RIGHT TO PRESENT EVIDENCE AT TRIAL OF PLAINTIFF'S ALCOHOL USE BECAUSE THAT INFORMATION WAS CRUCIAL TO THE DEFENSE THAT THE PLAINTIFF'S INJURIES WERE NOT PROXIMATELY CAUSED BY ANY ALLEGED DEPARTURE FROM STANDARDS OF MEDICAL CARE ON THE PART OF THE DEFENDANTS.

"A. *The Evidence of Alcohol Use Was Relevant Testimony In This Case*

"B. *Plaintiff Opened the door To The Issue Of Alcohol Use*

"C. *Admission of Evidence Regarding Intoxication And Alcohol Use Would Not Have Been Trial By Ambush*

"ASSIGNMENT OF ERROR NUMBER TWO

"THE TRIAL COURT ERRED BY ALLOWING DR. COHEN, AN EXPERT WITNESS FOR THE PLAINTIFF, TO TESTIFY AS TO A NEW OPINION AT TRIAL

"ASSIGNMENT OF ERROR NUMBER THREE

"THE TRIAL COURT ERRED BY EXCLUDING TESTIMONY OF DR. FRY AS TO THE PROXIMATE CAUSE OF THE INJURY TO THE COMMON BILE DUCT

"ASSIGNMENT OF ERROR NUMBER FOUR

"THE TRIAL COURT ERRED BY AWARDING PREJUDGMENT INTEREST

"A. *As Defendants Had A Good Faith, Objectively Reasonable Belief That They Had No Liability, They Did Not Need To Make A Monetary Settlement Offer*

"B. *Plaintiff Failed To Make A Good Faith Effort To Settle The Case*

"ASSIGNMENT OF ERROR NUMBER FIVE

"THE AWARD OF PREJUDGMENT INTEREST IN THIS CASE SERVED AS AN UNCONSTITUTIONAL CHILL ON THE DEFENDANT'S RIGHT TO A JURY TRIAL

"ASSIGNMENT OF ERROR NUMBER SIX

"THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION UNDER R.C. 2323.57 WHICH WOULD ALLOW THE AMOUNT OF THE JUDGMENT TO BE MADE IN PERIOD PAYMENTS

"A. *R.C. 2323.57 Imposes a* ***Mandatory*** *Duty On The Trial Court To Enter A Periodic Payment Plan In Those Cases Where The Terms Of The Statute Are Applicable*

"B. *The Periodic Payment Statute Does Not Violate Plaintiff's Due Process Rights*

"C. *The Periodic Payment Statute Does Not Violate The Right To A Jury Trial Guaranteed By Article I, Section 5 Of The Ohio Constitution Or The Seventh Amendment Of The United States Constitution*

"ASSIGNMENT OF ERROR NUMBER SEVEN

"THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION OR [*sic*] NEW TRIAL AS THE JURY VERDICT WAS EXCESSIVE AND GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE

"ASSIGNMENT OF ERROR NUMBER EIGHT

"THE TRIAL COURT ERRED BY DENYING DEFENDANTS' MOTION FOR SET-OFF OF THE SOCIAL SECURITY DISABILITY PAYMENTS AND THE OHIO BELL PENSION PLAN PAYMENT

"ASSIGNMENT OF ERROR NUMBER NINE

"MISCONDUCT ON THE PART OF PLAINTIFF'S COUNSEL DURING CLOSING ARGUMENT WARRANTS A NEW TRIAL

"ASSIGNMENT OF ERROR NUMBER TEN

"APPELLANTS ARE ENTITLED TO A NEW TRIAL BECAUSE THEY WERE DEPRIVED OF A FAIR TRIAL DUE TO THE CUMULATIVE EFFECT OF VARIOUS ERRORS COMMITTED BY THE TRIAL JUDGE PRECEDING, DURING AND AFTER THE TRIAL" (Emphasis *sic.*)

JOURNAL ENTRY

DEC. 30, 1991

CASE NO. 168629 ASSIGNED JUDGE Lawther
Charles Galayda VS Lake Hospital Systems, Inc. et al

Defendants' Motion for New Trial and Motion to Conform Verdict pursuant to R.C. 2307.43

Overruled

/s/ Robert Z. Lawther
JUDGE

JOURNAL ENTRY

DEC. 30, 1991

CASE NO. 168629 ASSIGNED JUDGE Lawther
Charles Galayda VS Lake Hospital Systems, Inc. et al

Verdict and Judgment for Plaintiff vs. Defts. Armand Damian and Damian Clinic

$ 2,781,710.00 plus costs.

Verdict and Judgment for Defendants Efren Glorioso M.D. and Lake Emergency Services, Inc., and Mostafa Rezai, M.D. at plaintiff's costs

/s/ Robert Z. Lawther
JUDGE

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES GALAYDA Plaintiff -vs- LAKE HOSPITAL SYSTEM, INC., et al. Defendants	)	CASE NO. 168629 JUDGE ROBERT M. LAWTHER JOURNAL ENTRY AND OPINION

On July 30, 1991 the jury returned a verdict in this medical malpractice case against Defendants Armand Damian, M.D., and Damian Clinic, Inc. in the sum of $2,781,710. An interrogatory disclosed past damages of $800,000, future pain and suffering in the sum of $1,396,125 and future lost wages and benefits in the sum of $585,585. All other defendants were dismissed or found not negligent by the jury.

In accordance with Ohio Revised Code 2323.57 Defendant timely filed a motion for Periodic Payment of Future Damages. Plaintiff then filed a brief in opposition to any kind of periodic payment on the grounds that the statute is unconstitutional, being unreasonable, arbitrary, and having no reasonable relationship to any goal which may have been perceived by the Legislature to benefit the public health and welfare.

Plaintiff relies heavily upon *Morris vs. Savoy*, (1991) 61 O.S.3rd 684 which was decided after the verdict was returned in this case, and which declared unconstitutional ORC 2307.43 which attempted to limit general damages in a medical claim to $200,000. Plaintiff claims

that the same reasoning applied by the Court in that case would apply to the issue of periodic payment of future damages as provided for in ORC 2323.57.

The constitutionality of a cap on medical malpractice verdicts had been in doubt ever since the statute was enacted. Numerous trial judges have found it unconstitutional, and it is surprising that the issue had not previously reached the Supreme Court.

The Court's majority found the cap to be unconstitutional on the grounds that it violates the due process clause of the Ohio Constitution, Sec. 16, Art. I, being unreasonable and arbitrary and bearing no real and substantial relationship to public health and welfare. The Court stated (Page 690):

> "The language of the Act clearly shows that it was aimed at malpractice insurance rates, which had been rising rapidly in years previous. . . . We are unable to find, either in the amici briefs or elsewhere, any evidence to butress [sic] the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates. There is evidence of the converse, however."

The Supreme Court further cited (page 691) *Nervo vs. Pritchard*, unreported, decided by the Stark County Court of Appeals in 1985:

> "It is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severly [sic] injured by medical malpractice."

Plaintiff in the instant case analogizes this reasoning to the issue of periodic payments, and claims that there is

no rational connection between such payment of damages and medical malpractice insurance rates. He further claims that such a plan discriminates against those plaintiffs most severely damaged by medical negligence.

Two major issues confront the Court in this matter. (1) Does the trial court have discretion to grant or reject Defendant's request to pay future damages in excess of $200,000 over a prescribed number of years, and (2) does Sec. 2323.57 violate one or more clauses of the Ohio Constitution?

Both issues require a comparison of Sec. 2323.57 with Sec. 2323.56, a related statute providing for periodic payment of future damages in tort cases other that [sic] medical claims. The comparison is both interesting and curious, for it illustrates remarkable diversity in the apparent motivation for these two statutes, and the willingness of the Legislature to afford special treatment for one class of defendants, those charged with medical negligence.

Sec. 2323.56 gives the appearance of being helpful to plaintiffs who might find it advantageous to receive future damages in the form of periodic payments because of special circumstances. Under this statute the Court is required to hold a hearing and to consider the following six factors:

> The purposes for which future damages were awarded.
> Plaintiff's business or occupational experience.
> Plaintiff's age.
> Plaintiff's physical and mental state.

> Whether plaintiff, parent, quardian [sic] or custodian of plaintiff is able to competently manage those portions of future damages.
>
> Any other circumstances that relates to whether the injury sustained by plaintiff would be *better compensated* by the payment of future damage in a lump sum, or by a series of periodic payments. (Emphasis supplied)

The above considerations in a non-medical case permit the Court, in its discretion, to devise a plan for periodic payment that will insure future care for the plaintiff, competent management of the funds, and the exercise of common sense for plaintiff's benefit. No language in the statute requires consideration of *Defendant's* needs or desires, nor does it indicate any concern as to whether a tortfeasor can afford to pay a judgment rendered against him.

Under Sec. 2323.57, however, no such procedure is set forth with respect to verdicts rendered in cases of medical malpractice. No attempt is made to safeguard any right of plaintiff to object to periodic payments, or to demonstrate why a lump sum would be preferable. Of even greater concern is the fact that while Sec. 2323.56 provides for interest on those portions of the judgment yet unpaid, no interest on future periodic medical damages is even mentioned in Sec. 2323.57.

The obvious result of application of Sec. 2323.57 to a judgment for future damages arising out of medical malpractice would be to delay plaintiff's recovery of damages. to deprive him of the right to interest on the judgment, and to benefit greatly only the tortfeasor or his insurance carrier. Either would be permitted to pay the

judgment on the installment plan with what will no doubt be cheaper dollars in the future, all at plaintiff's expense and sorrow.

On the issue of judicial discretion, Sec. 2323.57 (D)(1)(d) states as follows:

> "The Court may modify, approve, *or reject any* submitted periodic plan."
>
> Paragraph (F) states:
>
> "*If* a court orders a series of periodic payments . . . " (Emphasis supplied)

Reading these two sections in pari materia leads this Court to conclude that the trial court does have discretion to deny a motion for periodic payment of future damages, there having been no persuasive reason given why plaintiff's recovery should be delayed. In arguing that the statute is mandatory, Defense Counsel still admitted that the court could adopt any plan, even one which calls for payment of 50% one year and 50% the next. Such interpretation of a "mandatory" statute would indicate considerable discretion on the part of the court. Defendant cites the use of the word "shall" in the statute, but it refers to what shall be included in the journal entry, *if* the Court adopts a plan.

It is also apparent that Sec. 2323.57 must fail on Constitutional grounds. In accordance with the reasoning in *Morris vs Savoy* this Court finds the statute to be unreasonable, arbitrary, and having no reasonable relationship to any good which may have been perceived by the Legislature to benefit the public health and welfare. The unconscionable and unjustified distinction drawn by the Legislature between the rights of "ordinary" plaintiffs

and those who are victimized by medical malpractice can only be perceived as special treatment for one class of tortfeasor to the detriment of those plaintiffs most severely injured by their negligence.

Although *Morris vs. Savoy* was decided on the limited issue of due process, this Court believes that the reasoning set forth in the compelling dissent by Justice Sweeney can likewise be applied to the question of periodic payments. His opinion cites the right to trial by jury, guaranteed by Sec. 5, Art. I of the Ohio Constitution, which states that such right shall be "inviolate". It is clear that any mandatory scheme for periodic payment of future damages would infringe upon the jury's function to determine damages.

During oral argument on this motion, defense council stated that the purpose of the statute was to "reduce the costs of medical care, but it is too soon to tell if that will be the result." If studies during the last sixteen years fail to show that the $200,000 cap on damages has reduced insurance costs, it is difficult to accept the argument that periodic payments will do so in the future.

Defendant also suggests that the Court should consider the fact that he had insurance coverage of only $1,200,000. Counsel stated, "How can Dr. Damian afford to pay this judgment?" Defendant's ability to pay is clearly not an issue, and he has the same remedies and alternatives available to other defendants who owe substantial judgments.

Defense Counsel also suggested that Defendant's purchase of an annuity with a portion of the judgment would permit him to pay the full amount over a period of

years. No doubt all tortfeasors would like to have the opportunity to pay judgments in that fashion for a fraction of the full amount, but it cannot seriously be argued that an "inviolate" jury verdict can be satisfied in that manner.

This Court concludes that Sec. 2323.57 fails the same constitutional tests laid down in *Morris vs. Savoy*, plus others mentioned above, and that the Court does have discretion to reject any plan for periodic payment of future damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion be denied.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent by ordinary U.S. Mail this 30 day of Dec, 91 to Peter H. Weinberger, Counsel for Plaintiff and Anthony Dapore, Counsel for Defendants at their respective offices.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES GALAYDA Plaintiff	)	CASE NO. 168629
-vs-	)	JUDGE ROBERT M. LAWTHER
LAKE HOSPITAL SYSTEM, INC., et al. Defendants	)	JOURNAL ENTRY AND OPINION

Re: Motion for Prejudgment Interest

This matter came on for oral hearing by the Court on October 21, 1991 on the Motion for Prejudgment Interest timely filed by plaintiff pursuant to R.C. 1343.03(C). Upon consideration of this motion, the briefs and exhibits filed by the parties, the evidence and arguments presented at the oral hearing, and pertinent portions of the record and pre-trial depositions, the Court finds that the motion should be granted.

Plaintiff sued numerous parties for alleged medical malpractice arising out of care and treatment he received following a serious automobile accident in 1988. Among the defendants were Lake Hospital Systems, Dr. Mostafa Rezai, Dr. Efren Glorioso, Dr. Armand Damian and the Damian Clinic, Inc. The hospital was dismissed before trial, and Drs. Rezai and Glorioso were found not negligent by the jury. A verdict was returned against Dr. Damian and his clinic in the total sum of $2,781,710.

Plaintiff had three separate surgeries performed by Dr. Damian at Lake Hospital during a period of several weeks. As his condition worsened, a decision was made

to life-flight him to Metro General Hospital where additional surgery was performed. Although plaintiff alleged numerous acts of malpractice, the thrust of his allegations against Dr. Damian were that plaintiff should have been sent to a Level 1 Trauma Center like Metro immediately after his accident, and that Dr. Damian failed to discover a leak in the common bile duct as the result of failing to perform an interoperative cholangiogram to determine such leaks at any time during any of the three surgeries he performed.

In response to interrogatories submitted to the jury at the request of defense counsel, the jury set forth the following answer with respect to ways in which Dr. Damian and his clinic failed to meet accepted standards of care:

1. "Failure to order Cholangiogram for Mr. Galayda in any of his surgeries.

2. "Failure to recognize the need for definitive treatment and transfer of Mr. Galayda, early on, to a hospital capable of handling his injuries."

Prejudgment interest may be awarded by the trial court under the guidelines contained in R.C. 2343.03(c) as follows:

> "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid. if upon motion of any party to the action, the court determines at hearing held subsequent to the verdict or

> decision in the action, that the party required to pay the money *failed to make a good faith effort to settle the case* and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." (emphasis added)

The major case interpreting this statute, always cited by defense counsel, is *Kalain vs. Smith* (1986) 25 Ohio St. 3rd 157 which set down the rule in its syllabus as follows:

> "A party has not failed to make a good faith effort to settle under R.C. 1343.03(c) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

In the opinion, on page 203, Justice Wright also states that "The decision as to whether a party's settlement efforts indicate good faith is generally within the sound discretion of the trial court. This court will not overturn a finding on this issue unless the trial court's actions indicate an abuse of discretion."

The language of the statute and the *Kalain* case both impose upon the trial court one of its most difficult tasks in cases which frequently have already resulted in substantial verdicts. The court is expected to look into the minds of defense counsel to determine *their* reaction to pre-trial discovery and how it may have affected their rational evaluation of risks and potential liability. And

what may be "an objective reasonable belief of no liability" to one lawyer may mean something entirely different to others. In making such a determination, the court must apply its own experience and judgment to the parameters of the entire case, and consider whatever evidence may be produced by both sides concerning pretrial discovery, negotiations and the likelihood of victory in a jury trial.

In some cases defense counsel have taken the position that *Kalain* protects them from liability for pre-judgment interest in "no pay" cases provided they assert that in their minds, liability was doubtful. It is helpful to the court to consider the facts in *Kalain* which led to the Supreme Court's conclusions. Mr. Kalain attempted to pass a truck and then to pass the defendant's car on a two lane road without sounding his horn, as required by law. Defendant Smith testified that she activated her left turn signal and began to make a left turn when struck by Kalain's auto. Although Smith had offered nothing in settlement, the Court reversed an award of pre-judgment interest. In such a fact situation, it is not difficult to understand defendant's belief that she was making a legal left hand turn, had done nothing to cause the accident, and that a jury would in all probability place full blame on Kalain. Thus the Court found that her refusal to make an offer in settlement did not demonstrate lack of good faith.

An analysis of potential liability in a medical malpractice case, however, is generally far more complicated than in other kinds of tort actions. The purpose of the statute is to encourage settlement of such cases where

reasonable minds can recognize the strengths and weaknesses of both sides, especially in view of the expert testimony which will be offered at trial. The court in this case has endeavored to analyze the situation which developed during pre-trial and discovery proceedings, bearing upon the question as to whether defense counsel's "no pay" position could be considered "failure to rationally evaluate risk and potential liability." The court has identified three major areas of concern which should have alerted Defendants to the strong possibility that Plaintiff would prevail.

Analysis of expert testimony:

Dr. Donald Fry, an outstanding surgeon and expert in bile duct problems, was Defendants's major expert. Dr. Fry was quite candid on deposition and during trial testimony concerning Dr. Damian's medical care. Like all the doctors who testified on the issue of whether Dr. Damian should have performed an interoperative cholangiogram, *Dr. Fry stated that he should have done so, that Dr. Fry would have done so, and that a majority of surgeons would have done so.* Nevertheless he sought to excuse Dr. Damian's failure to perform this standard procedure in cases of bile leakage, in whatever language he could muster, but was clearly placed in an embarrassing position when asked if this failure constituted substandard care. In the opinion of this Court, a perusal of Dr. Fry's deposition and a review of his trial testimony would lead most observers to conclude that Dr. Fry felt the care was substandard, but didn't want to so state. See page 40 of his deposition taken on Feb. 12, 1991:

Q. is it your opinion to a reasonable degree of medical certainty that his failure to do an intraoperative cholangiogram fell below the standards of care applicable general surgeons at the time?

A. It would be my contention that it would be appropriate to do operative cholangiography for this setting.

Q. Okay. So it is your opinion, then, that if he didn't do it, that his failure to do so was a violation of those standards of care?

A. Given where the staining is described and so forth, I think it's difficult to fully understand what was going through his mind. He'll have to address that better than I. But in general, if I had staining around the bile ducts with bile, it would be my practice to do the cholangiogram, and I believe that's what most people would consider to be the correct thing to do.

Defendants' second major expert was Dr. Jonathon Glauser who was called as a specialist in emergency medicine to testify in behalf of Dr. Glorioso, one of the doctors found not negligent by the jury. Dr. Glauser's testimony, however, had direct relationship to Dr. Damian's performance as well. Dr. Glauser testified at his deposition on Feb. 18, 1991 that plaintiff "would have met the criteria for recommending that he be managed at a level one trauma center when he arrived," one of the two issues that the jury was asked to evaluate by interrogatory.

Dr. Glauser also testified at his deposition (page 41) that all of plaintiff's injuries, including the bile duct

injury, were sustained in the automobile accident. This contravenes one of defendants' theories to the effect that plaintiff's bile duct injury somehow occurred during surgery at Metro Health.

Plaintiff presented Dr. Marc Shapiro as his expert, and he gave persuasive testimony on deposition and in trial to the effect that the bile duct injury occurred in the automobile accident, that Dr. Damian "missed it" through failure to do a cholangiogram during any of the three surgeries, and that plaintiff's injuries required that he be transferred to a Level I Trauma Center without delay. While we would expect plaintiff's expert to support these allegations, the Court noted that he was a particularly persuasive witness who appeared to give straightforward and convincing testimony. In comparing his testimony to that of Dr. Fry, defense counsel must have been concerned as to the reaction the jury would have to Dr. Fry.

Peer review:

Evidence at the oral hearing on this motion disclosed that Defendants' insurance carrier presented this case to its Peer Review Committee on Feb. 21, 1990, and that the committee consists of three surgeons. At this time the initial decision was made to make no offer in settlement, but it appears that the committee did not have the benefit of depositions or reports from any of the experts who would ultimately review the facts and render opinions as to standard of care. The evidence does not indicate that this information was ever made available to the committee at a later date.

Involvement of Dr. Damian's private attorney:

Prior to the hearing on this motion, Defendants produced on discovery a letter to Mr. Dapore from Attorney Mario Ciano, who had been hired to represent Dr. Damian's personal interests. Mr. Ciano is one of the most distinguished defense attorneys in Ohio and is presently Managing Partner of Reminger & Reminger, a nationally known defense firm with much experience in medical malpractice cases. Mr. Ciano was, of course, concerned about the problem of inadequate insurance coverage for his client, and his comments must be viewed in that light. However, his analysis of the case, and his advise to Mr. Dapore at the time have a direct bearing on the issue of "good faith":

Mr. Ciano urged Mr. Dapore to engage in settlement negotiations, and cited some of the following reasons:

> "The pertinent medicine involved in the case is complex the damages are catastrophic. Dr. Fry is strong on the generalities of defense but weak on the specific issues relating to the diagnosis of bile duct injury and fistula. Dr. Eckhauser (who operated at Metro) has been put on the defense and will be a most difficult witness to overcome. . . . By offering nothing we are giving them nothing to risk and commensurately greatly enhancing Dr. Damian's risk . . . Plaintiff will move from his demand – and will move substantially. However, in the negotiating posture of having no money whatsoever offered, there is no reason or incentive for him to do so."

Mr. Ciano recommended that an initial offer of $300,000 be made in an effort to determine if settlement within the policy limits might be possible. At the oral

hearing on this motion, Mr. Dapore testified that he had replied to Mr. Ciano that if $300,000 would settle the case, he would be willing to recommend it. *No such offer, or any offer was ever made, however.*

Two days following the Ciano letter, Dr. Damian's insurance carrier faxed a report to its reinsurance co. in London concerning the impending trial date, and stated:

> "we wanted to alert you of this trial because of the potential for a plaintiff's verdict."

Defendants' theory of defense:

Defendants advanced a theory to the effect that all bile leaks had been corrected by Dr. Damian, and that the injury to the common bile duct disclosed by a cholangiogram at Metro Health must have occurred during plaintiff's care and treatment at Metro. On page 4 of Defendants' brief, counsel stated that he had presented "substantial evidence" in support of that allegation. The court cannot recall nor does his notes indicate any such evidence beyond mere speculation. It is significant to note, however, that Dr. Alan Cohen, Medical Director of Radiology at Metro, gave significant testimony to the contrary. In his deposition, at page 20 he stated:

> "In reviewing the case, even from day one, when Mr. Galayda came to our institution, it was my strong opinion that Mr. Galayda had a leak from somewhere, that by looking at that chart, there had to be a bile leak involved with it, and this could well be infected, and that most likely surgery would have been needed at that time as was undertaken by Dr. Eckhauser, to fix it; that I also thought, the history I knew in a

prospective fashion from, I believe the first day I knew Mr. Galayda was about July 12th, 1988, from that point, that that was my opinion and from the records, again, not knowing exactly what they were that were available to me at that time, on July 12th, 1988, had indicated that intervention perhaps should have been performed earlier, or that the conditions pre-existed a significant amount of time. I would rather not say intervention, I am not a surgeon, but the conditions had pre-existed for a significant amount of time.

In a subsequent brief Defendants submit additional authority in opposition to prejudgment interest, citing *Villella vs. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36. This case involved a dispute over automobile repairs, and the jury returned a verdict for $250 compensatory damages, $15,000 attorney fees, and punitive damages in the sum of $150,000. The trial court then awarded prejudgment interest. The Supreme Court, in an opinion by Justice Resnick, upheld the award of punitive damages but reversed the award of prejudgment interest.

Defendants' brief quotes the opinion as holding that "it must be demonstrated that there was a dishonest purpose, conscious wrongdoing or ill-will in the nature of fraud" for prejudgment interest to be awarded. The actual opinion, however, does not contain the words "it must be demonstrated", but cites and approves the criteria set down in *Kalain vs. Smith* and in the same paragraph adds the following dicta:

"Furthermore, a lack of good faith means more than poor judgment or negligence; rather, it

> imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud."

Justice Resnick cites *Ware vs. Richey,* (1983) 14 Ohio App. 3rd 3 as the source of this language. It is interesting to note that the *Ware* case drew it from *Centennial Ins. Co. vs. Liberty Mutual Ins. Co.,* 62 Ohio St. 2d 221, which had cited *Slater vs. Motorists Mutual Ins. Co.,* (1962) 174 Ohio St. 148. These early cases long predate the prejudgment interest statute and do not deal with medical malpractice. They arose out of the issue of "bad faith" on the part of an insurance company which refuses to settle a tort case for the policy limits when it appears that a verdict substantially higher may be awarded. It does not appear that Justice Resnick meant to lay down new guidelines superceding *Kalain,* and no reference to the prejudgment interest question appears in the syllabus of the case. The syllabus deals only with the question of punitive damages, which was the major issue of the case, and which had a direct bearing on the Court's denial of prejudgment interest. Justice Resnick further stated on page 42:

> "Consequently, because punitive damages over and above the amount adequate to compensate the plaintiff were awarded, prejudgment interest *to compensate for delay in payment* was unnecessary and the award of prejudgment interest must be vacated." (emphasis supplied)

Accordingly this court concludes that the *Villella* case dealt with a particular situation involving punitive damages, and was not intended to abrogate the guidelines contained in *Kalain.*

It is, of course, necessary for plaintiff to have made a good faith offer to settle the case. Plaintiff submitted into

evidence letters to defense counsel dated May 7 and May 14, 1991 in which the demand of $5,000,000 was reiterated and in which defense counsel was urged to enter into meaningful settlement negotiations. In addition, plaintiff's counsel met with Mr. Ciano to discuss the matter and no doubt urged his intervention in an effort to elicit some kind of offer. In pre-trial discussions this court also discussed settlement with both sides and made no progress. It was apparent at that time that plaintiff's demand would be reduced substantially if a reasonable offer would be made, but that plaintiff was unwilling to "bid against himself".

The Court finds that defendants stated their position of no offer and no settlement in such unmistakably rigid terms that plaintiff's presentation of nay reduced demand would have been a vain act. The subsequent verdict of almost $3,000,000 demonstrates that the original demand of $5,000,000 was not absurd. Plaintiff's obligation under *Kalain* was to make a good faith offer and to respond in good faith to an offer from the other side. Since no offer was made, plaintiff was precluded from any opportunity to respond in good faith. The Court finds that when defendants closed the settlement door, they effectively terminated all chance for good faith negotiation. Defendants decreed that a trial was the only path to resolution.

The Court finds that defendants did not rationally evaluate the essential risks of a plaintiff's verdict, and failed to respond in good faith to an offer from plaintiff. It would be proper for a defendant to decline to make a settlement offer where a reasonably prudent trial lawyer would consider the probability of plaintiff's success to be nonexistent, or barely marginal at best. It is not prudent,

however, to ignore the obvious and apparent adverse consequences of all the evidence and fail to rationally assess risks which are reasonably apparent.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's Motion for Prejudgment Interest be granted, and that plaintiff be awarded prejudgment interest at the rate of 10% per annum from the date of the accident, June 18, 1988, until the judgment is paid, and his costs of suit.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

December 30, 1991

Certificate of Service

A copy of the foregoing Journal Entry and Opinion was hand delivered to counsel for plaintiff and defendants, in chambers, this 30 day of December, 1991.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES GALAYDA Plaintiff -vs- LAKE HOSPITAL SYSTEM, INC., et al. Defendants	)	CASE NO. 168629 JUDGE ROBERT M. LAWTHER JOURNAL ENTRY AND OPINION

Re: Motion for Set-off of collateral source

The verdict in this medical examination malpractice case included future lost wages and benefits in the sum of $585,585. Defendants Armand Damian, M.D. and Damian Clinic, Inc. filed a motion for set-off of Plaintiff's future Social Security benefits and additional benefits to be paid under a disability pension plan set up by his former employer. Defendants allege the following benefits must be set off by virtue of R.C. 2305.27:

Social Security benefits to Plaintiff	$281,472
Social Security benefits to his children	64,513
Ohio Bell Disability Plan benefits	253,097
TOTAL	$ 599,082

In support of these computations, based on present value, Defendants filed an affidavit of James M. Marietta III, C.P.A. While objecting to Defendants' motion in toto on Constitutional grounds. Plaintiff responded to the Marietta affidavit with one prepared by Dr. John F. Burke,

Jr. He states that Defendants' figures are erroneous, and that if any set-off is allowed, the proper figures are substantially lower.

The Court indicated at the oral hearing that if any set-off would be allowed, a subsequent hearing would be held in order to hear sworn testimony from both economists, subject to cross-examination. In view of the decision which follows, the Court finds it unnecessary to take additional testimony.

R.C. 2305.27 reads as follows:

> "Except as provided in section 2743.02 of the Revised Code, in any medical claim, as defined in division (D) of section 2305.11 of the Revised Code, an award of damages shall not be reduced by insurance proceeds or payments or other benefits paid under any insurance policy or contract where the premium or cost of such insurance policy or contract was paid either by or for the person who has obtained the award, or by his employer, or both, or by direct payments from his employer, but shall be reduced by any other collateral recovery for medical and hospital care, custodial care or rehabilitation services, and loss of earned income. Unless otherwise expressly provided by statute, a collateral source of indemnity shall not be subrogated to the claimant against a physician, podiatrist, or hospital."

Defendants allege that Social Security benefits and disability pension benefits do not constitute "insurance benefits" under the statute, but fall within the definition of "other collateral recovery, and loss of earned income". Defendants' brief relied heavily on a 1990 decision by the

Court of Appeals for Butler County, titled *Hodge vs. Middletown Hospital Assn.*, which held that Medicare Part A benefits are not "insurance benefits" and should be set off. Subsequent to the filing of Defendant's motion, however, the Hodge case was reversed and remanded by the Ohio Supreme Court on Dec. 18, 1991. (*Hodge vs. Middletown Hospital Assn.*, (1991) 62 Ohio St.3d 236). Although the statute had been adopted in 1975, no interpretation of its reference to insurance benefits had previously been considered by the Court. The pertinent portions of the opinion state:

> "The legislative intent behind the statute appears to be the prohibition of double recovery on medical claims for those plaintiffs whose collateral coverage was not paid for by themselves or their employers.
>
> "To fund Medicare Part A coverage, every employee and employer pays a portion of each paycheck into the Federal Hospital Insurance Trust Fund. In the broadest sense, then, Medicare Part A is insurance paid for by the employer and employee, for the benefit of the employee. . . . For these reasons, we hold that Medicare Part A benefits fall under the definition of "insurance" in R.C. 2305.27, and therefore do not reduce medical malpractice damage awards."

Although the Supreme Court is currently split 4 to 3 on the alleged unconstitutionality of R.C. 2305.27, the vote on the the insurance issue in the *Hodge* case was 7 to 0. It is the opinion of this Court that the reasoning set forth therein applies equally to the question of Social

Security benefits and disability pension benefits arising out of the case at bar.

It is common knowledge that Social Security disability benefits are paid out of a fund created by the equal contributions of employees and employers on every pay day. In order to make sure that these benefits are adequately funded, the amounts paid into the fund each year have been increasing annually, not through an increase in the rate but through increases in the amount of wages and salary subject to the deduction.

It is further not disputed that the Ohio Bell Disability pension is funded solely by Ohio Bell, although it is no doubt considered a "benefit" when wages and hours are negotiated. It thus must be considered as part of a contractural [sic] relationship between labor and management, which gives further credence to the application of the insurance language in the statute.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of Defendants for set off of Social Security and Disability Pension benefits be denied.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and opinion has been sent by ordinary U.S. Mail this 30 day of Dec, 1991 to Peter Weinberger, Counsel for Plaintiff and Anthony Dapore, Counsel for Defendants at their respective offices.

THE SUPREME COURT OF OHIO

1995 TERM

Charles Galayda, Appellee,	:	To wit: February 15, 1995
	:	Case No. 93-2276
v.	:	RECONSIDERATION ENTRY
Lake Hospital System, Inc., et al.	:	(Cuyahoga County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby, denied.

(Court of Appeals No. 63151)

/s/ Thomas Moyer
THOMAS J. MOYER
Chief Justice